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## CASE AND COMMENT

TORT—INVITEES, LICENSEES AND TRESPASSERS

*A Comment on the Third Report of the Law Reform Committee*

THE Law Reform Committee's Report<sup>1</sup> on the liability of occupiers to invitees, licensees and trespassers and on the obligations of a lessor towards his tenant's invitees and licensees is of particular interest in relation to the many points on which it is difficult to state with confidence what the existing law is—a difficulty quite distinct from the even greater one of justifying and applying it. The Committee state the law as they find it, criticise it, and make recommendations for its amendment.

### *Uncertainties in the existing law*

The Committee examine the effect of the House of Lords decision in *Thomson v. Cremin*<sup>2</sup> on the unhappy distinction sometimes made between the warranties implied in favour of contractual visitors where the use of the premises is the primary purpose of the contract<sup>3</sup> and where it is only an ancillary purpose.<sup>4</sup> They ask whether two forms of contractual warranty, one involving and one not involving responsibility for an independent contractor, can continue to exist since the discovery of the decision in *Thomson v. Cremin*—that the duty of care owed independently of any contractual obligation by an occupier to his invitees is personal to him in the sense that he cannot rid himself of it by entrusting its performance to an independent contractor. They answer that

<sup>1</sup> Cmd. 9305. October, 1954.

<sup>2</sup> Decided in 1941: reported in [1953] 2 All E.R. 1185.

<sup>3</sup> *Francis v. Cockrell* (1870) L.R. 5 Q.B. 184; *Maclean v. Segar* [1917] 2 K.B. 325.

<sup>4</sup> *Gillmore v. L. C. C.* (1938) 159 L.T. 615; *Protheroe v. Railway Executive* [1951] 1 K.B. 376; *Bell v. Travco Hotels, Ltd.* [1953] 1 Q.B. 473.

"it would seem that this distinction between the two forms of implied contractual warranty can no longer be regarded as valid, at all events in cases turning on facts comparable to those in *Thomson v. Cremin*" (para. 4). Despite the caution of the concluding words it is to be hoped that the last has been heard of the limited warranty invoked, unnecessarily on the facts, in *Gillmore v. L. C. C.*<sup>4</sup> and later cases. It is inconceivable that the law should imply into a silent contract a duty less onerous than the duty it implies where there is no contract.

A further point arising out of the contractual duty of an occupier is cautiously mentioned by the Committee: "It is also open to question how far, if at all, the express or implied contractual duty is applicable to third parties entering the premises pursuant to the contract" (para. 6). Whatever duty may be owed to a person entering premises under a contract made by the occupier with another,<sup>5</sup> he cannot sue for breach of a warranty in the contract except under the rules of agency which are sometimes difficult to apply. The point has apparently not been tested in relation to premises although it might well have been taken in *Murray v. Harringay Arena, Ltd.*<sup>6</sup> where the plaintiff was a boy of six accompanying his parents.

On the distinction between invitees and licensees under existing law the Committee consider whether the relationship of invitee and invitor is dependent on a common material interest or whether an interest on the part of the occupier alone is enough. In the majority of the cases the courts have used such phrases as "common interest," "common material interest" or "joint interest." But Scott L.J. in *Haseldine v. Daw*<sup>7</sup> said "I see no legal ground for making community of interest an essential criterion. . . . I cannot see how the separate interest of the visitor necessarily affects the duty of the occupier" and *Jennings v. Cole*<sup>8</sup> is a case in which the facts defy any attempt to find an interest on the part of the visitor who at the request of the occupier was on the premises gratuitously to sit with the occupier's sick wife while the occupier was at work. The Committee, logically and reasonably, lean to the view of Scott L.J. and state that for the purposes of the Report, although the weight of authority may be against them, they accept "the position that the relationship of invitor and invitee is established where it is shown that the occupier has a material interest in the purpose of the other

<sup>5</sup> See *Fosbrooke-Hobbes v. Airwork, Ltd.* [1937] 1 All E.R. 108.

<sup>6</sup> [1951] 2 K.B. 529; cf. *Lockett v. Charles* [1938] 4 All E.R. 170 on an implied condition in sale of goods.

<sup>7</sup> [1941] 2 K.B. 343, at p. 352.

<sup>8</sup> [1949] 2 All E.R. 191.



party's visit, whether the other party shares that interest, or has some separate interest of his own, or not" (para. 7).

The Committee proceed to examine the familiar question of the extent of the duty owed to an invitee under Willes J.'s definition in *Indermaur v. Dames*.<sup>9</sup> What was the position before the House of Lords decision in *London Graving Dock v. Horton*?<sup>10</sup> Was the duty to make the premises safe or merely to give warning of a danger? The Committee express the view that in a majority of cases adequate warning of a danger is *in fact* sufficient protection against damage from that danger to a person using reasonable care for his own safety. But they point out that it is a very different thing to say that *as a matter of law* Willes J.'s definition makes proof of warning of the danger by the occupier, or of knowledge of the danger otherwise brought home to the invitee, an absolute bar to an action by the latter in all cases. They conclude: "Our own inclination would therefore have been to adopt the view that Willes J.'s definition means that the invitor must take reasonable care to see that the premises are reasonably safe, the fact that the invitee has been warned, or otherwise had knowledge, of the danger through which he was injured being a circumstance (and as a rule an important one) to be taken into account in favour of the invitor, but not necessarily conclusive against the invitee" (para. 19). But they then turn to the effect of *London Graving Dock v. Horton* (*supra*) and inevitably accept that the existing law includes the proposition that where the invitee by notice or otherwise has full knowledge of the nature and extent of the risk, he cannot maintain an action against the invitor for any damage caused to him by the unusual danger. "This means," they add, "that in many cases an invitee with such a degree of knowledge must choose between refusing to come on the premises at all or coming upon them at his own risk. Horton should have refused to use the staging until it was made adequate" (para. 22).

The present standing of *Haseldine v. Daw* (*supra*) is considered and it is the Committee's opinion that it is now settled that as a general rule an invitor is liable to his invitee for damage due to the shortcomings of an independent contractor employed by the former. They do not, as the matter now stands, regard *Haseldine v. Daw* (*supra*) as authoritative<sup>11</sup> (para. 26).

The Committee accept that the duty to licensees "extends only to concealed dangers or traps actually known to the occupier

<sup>9</sup> (1866) L.R. 1 C.P. 274.

<sup>10</sup> [1951] A.C. 737.

<sup>11</sup> But they think it possible that if a case involving comparable facts were to reach the House of Lords it might there be held that facts such as those in *Haseldine v. Daw* sufficed to warrant an exception to the general rule laid down in *Thomson v. Cremin*.

but not known to the licensee and that it is confined to giving warning of the existence of dangers of this limited class." What is the distinction between a "concealed danger or trap" on the one hand and an "unusual danger" on the other? It is admitted to be a narrow one. "All concealed dangers or traps are unusual dangers, though no doubt some unusual dangers are not concealed dangers or traps. Perhaps the distinction is best expressed as being that an unusual danger amounts to a concealed danger or trap where its presence is not observable by a person taking reasonable care" (para. 27).

As to the meaning of "actual knowledge" the Committee accept that such cases as *Ellis v. Fulham Borough Council*<sup>12</sup> and *Pearson v. Lambeth Borough Council*<sup>13</sup> "seem to make knowledge of potential danger equivalent to actual knowledge for the purposes of the duty of licensor to licensee, and to go a good way towards eliminating the distinction between danger of which actual knowledge is to be imputed to a licensor and that of which an invitor knows or ought to know" (para. 27). And they cite with approval the words of Pearson J. in *Hawkins v. Coulsdon & Purley U. D. C.*<sup>14</sup>: "if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved" (para. 27).

One had hoped for assistance from the Committee on the vexed question of the duty owed by an occupier to trespassers on his premises but the opening paragraph (para. 28) in this section is a disappointment. At this stage the Committee appear to have become impatient. "The duty of an occupier of premises to trespassers as such does not, we think, call for much comment" is a remark hardly expected after the earlier painstaking, well-documented, cautious approach to the duties to invitees or licensees. The paragraph rolls into one the duty of the occupier in regard to the static condition of his premises and his duty in respect of acts of misfeasance done on his premises,<sup>15</sup> his occupancy duties and his activity duties in the words of Professor Newark,<sup>16</sup> and while the rule as stated by the Committee may well be one of ordinary civilised behaviour the present state of the authorities—

<sup>12</sup> [1938] 1 K.B. 212.

<sup>13</sup> [1950] 2 K.B. 353.

<sup>14</sup> [1953] 1 W.L.R. 882; affirmed by Court of Appeal [1954] 1 Q.B. 319.

<sup>15</sup> A distinction stressed by Denning L.J. in *Dunster v. Abbott* [1953] 2 All E.R. 1572, at p. 1574; [1954] 1 W.L.R. 58.

<sup>16</sup> 17 M.L.R. (1954) 102.



none is cited by the Committee—makes it difficult to put it forward as settled law.<sup>17</sup>

The conventional approach to licensees by acquiescence<sup>18</sup> is accepted (para. 29) and likewise to children as trespassers or licensees. The latter point has, since the publication of the Report, been dealt with most comprehensively by Devlin J. in *Phipps v. Rochester Corporation*.<sup>19</sup>

The Committee accept that persons lawfully using premises provided for the use of the public such as parks, libraries and conveniences are, on the balance of authority, licensees and that persons entering premises under lawful authority such as police with search warrants are, on the existing law, to be treated as invitees unless in the circumstances their entry is contractual (paras. 37 and 38). The Committee necessarily though reluctantly accept that the occupier-licensee relationship applies at present between the lessor of premises who retains under his control the means of access, such as staircases and lifts, and persons living with or visiting the tenant.<sup>20</sup> But they doubt the propriety of this relationship and favour the application of the law of easements and of landlord and tenant.

### *Criticisms of the existing law*

The Committee, turning to the major question of whether the existing law is satisfactory, ask: "How far do the distinctions drawn by the law as it stands, 'subtle and apt to be confused' as they undoubtedly are, correspond to 'real differences' in the reasonable claims to protection of persons using property occupied by others? How far, on the other hand, are the subtle and confusing features of the existing law rightly to be condemned as the product of needless refinements and profitless distinctions?" (para. 45).<sup>21</sup> And the majority of the Committee find the existing law unsatisfactory in the following respects:

(a) There is no precise and satisfactory test for the application, in contracts which are silent on the matter, of one of two or more standards of care of differing degrees of stringency. And since *Thomson v. Cremin* (*supra*) the distinction between the higher and lower contractual duty is, to say the least, of doubtful validity (para. 52).

<sup>17</sup> See Clerk and Lindsell, 11th ed., 1954, p. 691; Lord Atkin in *Hillen v. I. C. I. (Alkali), Ltd.* [1936] A.C. 65, at p. 70; *Edwards v. Railway Executive* [1952] A.C. 737; *contra* Salmond, 11th ed., 1953, pp. 586–7.

<sup>18</sup> *Lowery v. Walker* [1911] A.C. 10; *Edwards v. Railway Executive* (*supra*).

<sup>19</sup> [1955] 1 All E.R. 129.

<sup>20</sup> *Fairman v. Perpetual Investment Building Society* [1923] A.C. 74; *Jacobs v. L. C. C.* [1950] A.C. 361.

<sup>21</sup> See Atkin L.J. in *Coleshill v. Manchester Corporation* [1928] 1 K.B. 776, at p. 791.

(b) The existing distinction between invitees and licensees, based on material interest, is capable of producing capricious and unreasonable results. This is illustrated by examples of visitors who are asked to dinner only (licensees); visitors who are asked to dinner for the purpose of discussing a business matter (invitees); customers entering a retail shop with a view to making purchases (invitees); persons entering the same retail shop merely to ask the way (licensees); the same inquiring persons on the way out after fortuitously making purchases in addition to asking the way (invitees); casual callers and collectors for charity at private residences (licensees); persons seeking work in the garden, knife-grinders and vacuum-cleaner salesmen (possibly invitees on their way in<sup>22</sup> but, if only licensees on the way in, invitees on the way out at any rate if they have done business). In addition they point out the complication of the person who is injured before he has had a chance of announcing the purpose of his visit (paras. 65 to 67) and the shades of difference within the class of licensees, as, for instance, between the licensee permitted for his own convenience to use a short cut and the licensee who has been expressly asked to dinner (para. 70).

(c) It is unreasonable that persons lawfully using premises provided for the use of the public should be mere licensees enjoying the benefit of only a strictly limited duty of care (para. 68).

(d) To assign to the category of invitees persons entering premises by lawful authority is difficult and illogical as their right to enter by no means depends on invitation or consent and may well be against the will of the occupier (para. 69).

(e) The distinction between an "unusual danger" and a "trap" or "concealed danger" is narrow and productive of difficulties (paras. 74 and 76).

(f) The distinction between a danger actually known to the occupier and a danger of which the occupier knows or ought to know, although at first sight wider, has been narrowed by recent cases and the criterion of actual knowledge, in the cases of licensees, is not in any case a desirable test, for "an occupier who inspects his property periodically may actually know of dangers of which an occupier so careless that he never inspects may remain ignorant" (para. 74).

(g) In some cases an absolute bar to a right of recovery by an invitee on the ground of full knowledge and appreciation of the nature and extent of the risk is liable to work injustice. The Committee think that even with this degree of knowledge the invitee

<sup>22</sup> But see *Dunster v. Abbott* [1953] 2 All E.R. 1572; [1954] 1 W.L.R. 58, in which a canvasser for advertisements was regarded as a licensee only.



should be entitled to succeed if it is shown that in all the circumstances of the case he acted reasonably in entering, or in using, or continuing to use, the premises notwithstanding the existence of the danger (para. 77).

(h) The decision of the House of Lords in *Thomson v. Cremin*, in so far as that decision makes an occupier of premises invariably and in all circumstances liable to his invitee for the negligence of an independent contractor employed by the former in the event of its giving rise to some danger by which the latter is injured, imposes too high a duty and the law as stated in *Haseldine v. Daw* and in *Woodward v. Mayor of Hastings*<sup>23</sup> is thought to be more satisfactory (para. 77 (ii) and para. 78 (v)).

(i) The existing law that the lessor of premises is under no liability to any person other than the tenant who may be lawfully on the demised premises for injury caused by breach of his contractual and statutory obligation to repair,<sup>24</sup> is capable both of causing hardship and of producing circuity of action (paras. 85 to 94).

#### *Recommendations: Codification or specific amendments*

With almost all the pronouncements of the Committee on the existing law, and with most of the detailed criticisms of it, there will, it is thought, be substantial agreement. But how were the Committee to report to the Lord Chancellor? At one extreme, they might well have despaired and recommended that no effort be made to improve the situation. They might, at the other extreme, have recommended that a short statute should provide, in well-chosen words, for the complete abolition of all special duties arising out of the occupation of premises and for a fresh start on the broad principle of *Donoghue v. Stevenson*.<sup>25</sup> In between these extremes they could recommend either statutory amendment of the law on specific points or, bravely, general amendment and codification on lines suggested by them. Mr. Kenneth Diplock, Q.C., favours the former course because he thinks codification of this branch of the common law is impracticable—and his reasons are impressive—and because he thinks that, despite its manifold imperfections in theory, most of the present law works substantial justice in practice. Elevation of certain classes of persons from licensees to invitees and the removal of the difficulties of *Fosbroke-Hobbes v. Airwork, Ltd.* (*supra*) and *Cavalier v. Pope* (*supra*) would meet his requirements. There will be many who will share

<sup>23</sup> [1954] K.B. 174.

<sup>24</sup> *Cavalier v. Pope* [1906] A.C. 428; *Ryall v. Kidwell* [1913] 3 K.B. 123.

<sup>25</sup> [1932] A.C. 562.

Mr. Diplock's apprehensions as to the difficulty of the task of codification and the unpleasant prospect of even greater uncertainty as to the rights of potential litigants before a new case law is settled on new and widely defined statutory duties. But the majority of the Committee have subscribed to a series of recommendations for codification, expressly stating that they do not underrate the difficulties attending such an attempt. They recommend that the distinction between invitees and licensees should be abolished and that:

"The occupier of premises should owe a duty ('the common duty of care') to every person coming upon the premises at his invitation or by his permission, express or implied, to take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe for use by the visitor for the purpose to which the invitation or permission relates."<sup>26</sup>

To this basic proposal they necessarily add a number of supplementary recommendations. Persons entering premises pursuant to some statutory or other lawful right of entry (not being a right conferred by contract) should be deemed to enter by the implied permission of the occupier, and persons lawfully using premises provided for the use of the public should be deemed to do so by the permission of the controlling authority, such authority being regarded as the occupier. A lessor remaining in occupation of the means of access to demised premises should owe the common duty of care to any third party lawfully using the means of access *unless a more onerous duty is imposed on the lessor by the tenancy agreement*. But where a lessor is bound by contract or statute to keep demised premises in repair, and in consequence of any breach by him of that obligation any person lawfully on the premises sustains injury, the person injured should have the same right of action against the landlord as he would have had if he himself had been the tenant *neither more nor less* and without prejudice to any other independent right of action.

Where a person enters premises under a contract between himself and the occupier, then if the contract includes a term regulating the duty of care owed by the occupier, the respective rights and obligations of the contractual visitor and the occupier should be measured exclusively by reference thereto. In other cases the occupier's duty should be the common duty of care owed to all lawful visitors. And where a person contracts with the occupier for the use of premises on the footing that he is to be entitled

<sup>26</sup> "Reasonable care to see that the premises are *reasonably safe*" is apparently deliberate wording.



to permit third persons to use them the duty owed by the occupier to such third persons should be the same as that which he owes to all lawful visitors *unless the contract imposes on the occupier terms more onerous than the common duty of care*. So that not only is a limit imposed by the contract on the common duty to take care to be ineffective against the third persons (and *Fosbrooke-Hobbes v. Airwork, Ltd.* (*supra*) disposed of) but the third persons are to be owed a higher duty than the common duty if the contract creates such a duty to the person with whom it is made.

In addition there are recommendations which would, in effect, remove the heavy burden imposed by *Thomson v. Cremin* (*supra*); reduce the visitor's knowledge of a danger from a bar to success to a fact to be considered by the court in deciding whether the common duty has been discharged, whether a condition has been attached to the permission to enter and whether the visitor has taken reasonable care for his own safety; preserve the defence of *volenti non fit injuria*; and apply the Law Reform (Contributory Negligence) Act, 1945.

These recommendations are consistent with the Committee's criticisms of the existing law and many of them seem desirable but one recommendation can only be described as frightening. It is the recommendation <sup>27</sup> that:—

“The common duty of care should be capable of extension, restriction, modification or exclusion by any representation or condition expressly or impliedly made or notified to the person entering in connection with the occupier's invitation or permission.”

In so far as this relates to *express* exclusion of the duty of care it is presumably inspired by consideration of the right of an occupier to say: “these are my premises and you can only enter them on my terms: if you do not accept my terms you must not enter,” a right of property which is at the root of most of the difficulties of this branch of the law. But an express statutory provision on the lines suggested is capable of producing a rash of notice boards saying, in effect, “Occupiers Liability Act, 1955: Notice is hereby given that the common duty of care is wholly excluded. Section 95 (2) (iii).” Whatever the existing law may be, it seems undesirable, at a time when the courts are striving so hard to defeat clauses in contracts excluding general liability for negligence, that occupiers should be invited by statute to do that very thing by the exhibition of notices. The difficulties of the draftsman of the statutory provision would in any case be formidable: it is

<sup>27</sup> Stated fully in para. 78 (iii) but paraphrased in para. 95A (2) (iii).

clearly not intended that the duty to police officers and others, entering under lawful authority but being deemed to do so by implied permission, should be capable of exclusion.

But the major problem would be the "representation or condition *impliedly* made or notified to the person entering." If the courts are to embark on the task of deciding the circumstances in which a term is to be implied extending, restricting, modifying or excluding the common duty of care which is normally to be implied, will it not be found eventually that the two existing classes, invitees and licensees, have been replaced by new classes of lawful visitor, of unlimited number, each owed a special duty differing from the common duty because of the circumstances of the invitation or permission to enter, and each in course of time defined as a matter of law? This would be a disaster and the recommendation which foreshadows it finally drives the writer of this note—after some hesitation and with full appreciation of the great value of the Report—into Mr. Diplock's camp. Codification of this branch of the common law would be perilous indeed and it seems, in Mr. Diplock's words, more practicable to "limit statutory intervention to specific amendments of the law in those cases where the doctrine of *stare decisis* has prevented the common law from adapting itself to current social and ethical conceptions," though the number of such amendments might well be greater than he suggests.

F. J. ODGERS.

#### AGRICULTURAL HOLDINGS—DISPOSSESSION ORDERS—PROCEDURE

THE case of *R. v. Agricultural Land Tribunal (South Western Province)*, *ex p. Benney* [1955] 2 W.L.R. 148 is a fascinating example of the results that a court can achieve by applying the accepted rules for interpretation of statutes. The court had to ascertain the meaning of section 104 of the Agriculture Act, 1947, which deals with the making of representations in respect of action by the Minister.

The obvious way to understand the purpose of a statute is to read the debate in Parliament, and it happens that in this instance the points had been fully discussed. The question is the procedure to be followed to secure that land is farmed efficiently. The Act gives the Minister power to make a supervision order against a farmer, followed by directions on husbandry which he must follow. If that does not produce enough improvement, the Minister can move to dispossess the farmer, but that gives a right of appeal to an Agricultural Land Tribunal, which is an independent body. The



Act provides for County Agricultural Executive Committees, to whom the Minister may delegate his powers, and the committees may delegate to sub-committees. It was assumed by everybody that the Minister's powers would be exercised by the committees. When the Bill was before Parliament it seemed to some members to be unfair on farmers that they should have no appeal against the making of a supervision order, and an amendment was moved to give an appeal to the Agricultural Land Tribunal (H. of C. Off. Rep. S.C.A., Feb. 25, 1947). The amendment was defeated. The Minister explained the procedure which was then in existence (under emergency powers) and which it was intended to continue:

"What will actually happen in practice is that members of a district committee will, perhaps, declare that a person's farm is not what it ought to be. They will have watched the farm over a long period of time and will have spoken to the farmer . . . and they will do their best to advise him. . . . But the man refuses to take heed and, later on, the same members of the county executive committee warn him. . . . If, after all this advice, he still fails, then, finally, he is warned that he is likely to be put under a supervision order.

"What is the next step? He is allowed, personally, to make representations to the local executive committee, or he can take along some legal person to support his case. He passes through the whole of that process before he reaches the supervision order state. It seems to me that if, after advice, warnings and, later, the serving of a notice and the fact that he has been allowed to attend before the county executive committee, he has failed to satisfy them as to his bona fides, it is not going too far to place that person under a supervision order. . . . It seems that so long as a person, before he can be dispossessed—and that is the final act—can put his case to an independent tribunal, it is not unreasonable that the county executive committees who have done their best to help, advise and guide the farmer, should themselves decide whether or not he ought to be placed under supervision."

By sections 12 and 17 a supervision order or a dispossession order cannot be made before affording to the occupier an opportunity of making representations to the Minister, whether in writing or on being heard by a person appointed by the Minister. There was a debate on clause 102 of the Bill, now section 104, about the person to whom the representations were to be made (H. of C. Off. Rep. S.C.A. April 17, 1947). It was clear from the Minister's speech on clause 12 (cited above) and from other speeches that the committees would do all the work about supervision orders. An amendment

was moved to secure that the representations should be made to some independent person. The supporters of the amendment regarded the making of representations as an appeal, and, as Mr. Joynson-Hicks asked (col. 972) "What is the good of making representations to a body which has already arrived at a decision?" The Solicitor-General explained that there is a dividing line: on the more important issues (including dispossession) there is an appeal to an Agricultural Land Tribunal which hears the whole case *de novo* and is independent, but supervision orders are on the other side of the line. He described the provision for representation in clause 102 by saying:

"This is not intended to be an appeal to an independent tribunal. . . . The object of making representations under clause 102 is to ensure that when a decision is arrived at it shall not be arrived at in ignorance of the person affected. The person affected is given the right of having his case known."

The amendment was rejected.

The Minister was pressed to include provisions requiring the appointment of sub-committees of executive committees (438 H. of C. 503) but he declined, on the ground that the permissive powers of sections 71 and 72 were adequate.

When the Act came into force the procedure was exactly that which had been outlined in debate on the Bill. The hearing of representations took place before a sub-committee (for an account of the machinery see 68 L.Q.R. 363). In *Benney's* case the ordinary practice had been followed, and eventually the Minister proposed to dispossess him and the Agricultural Land Tribunal dismissed the farmer's appeal. *Benney* applied for an order of certiorari. Section 104 governs the making of representations, and by subsection (4) it gives a right to be heard by a person appointed by the Minister. Subsection (5) provides:

"No officer or servant of a County Agricultural Executive Committee, or any sub-committee or district committee thereof, shall be appointed under the last foregoing subsection to receive representations relating to land in the area of the committee."

The Minister had appointed the sub-committee. The Divisional Court held that the subsection precluded the use of sub-committees for this purpose, and therefore the hearing was a nullity and the proceedings were void *ab initio*.

Lord Goddard said that "any person, even a lawyer" would find it obvious that sub-committees are barred. Then why had not that occurred to anyone before? I think that it depends on how fast you read it: read it slowly, with pauses, like a judge, and you see that sub-committees and district committees are barred. But



read it faster, and it seems that the bar is on officers and servants of committees, sub-committees and district committees. If the case had been decided simply on the words, it would be an instance of there being some ambiguity and of the court following what is probably the more grammatical construction. But the court went far beyond that. Lord Goddard was quite clear that the section is meant to give the farmer a right to go before some independent person. Presumably Cassels J. meant that, for he said that the section also bars the executive committee. Devlin J. decided, as his main ground, that an independent person is intended. His judgment (at 156) referring to "the spirit of the Act" and leading to his conclusion about the "intention of Parliament," is not consistent with what, as we have seen, did happen on clause 102 of the Bill.

The High Court has thus argued and carried the amendment that was lost when the matter was before Parliament. I am not blaming the judges for doing that: they do not look at Hansard or other material that would let them see what Parliament did intend. By their own rules, enshrined in precedent, the courts will not look at what every serious student regards as essential material. If an economist or a historian were to do that he would get no mercy from his colleagues. And what would a court say about a doctor's evidence if it deliberately ignored the most important facts in a diagnosis?

Lawyers are highly critical of statutes that are drafted so as to be as judge-proof as possible, yet to an appreciable extent that is merely a defensive measure against an outworn judicial rule dating from the days when Parliament objected to its proceedings being publicly known. If the law were altered, so that courts could consider all the available evidence before they decided on the intention of Parliament, we should get better decisions on these matters of interpretation. [Note: The Court of Appeal reversed the Divisional Court's decision on the question of interpretation, but a full report is not available.]

R. M. JACKSON.

CRIMINAL LAW—"USES" OR "PERMITS THE USE"—MENS REA OR  
ABSOLUTE PROHIBITION IN STATUTORY OFFENCE

IN *James v. Smee*, *Green v. Burnett* [1954] 3 W.L.R. 631, a Divisional Court of five judges considered (a) the meaning of "uses" and "permits to be used" and (b) how far *mens rea* in the sense of knowledge is required when a defendant is charged with "using" or with "permitting the use" of a motor vehicle contrary to

Regulation 101 of the Motor Vehicles (Construction and Use) Regulations, 1951. Regulation 101 provides "If any person uses or causes or permits to be used on any road a motor vehicle in contravention of . . . any of the preceding regulations he shall for each offence be liable to a fine not exceeding £20."

In each of the two appeals before the court a servant of a company on the company's business and in the ordinary course of his employment drove a vehicle of the company with brakes which in fact were defective in contravention of the regulations. In each case the company was charged under Regulation 101 but in *James v. Smee* the offence charged was that of "permitting the use" and in *Green v. Burnett* the offence charged was that of "using" the vehicle.

The joint effect of the majority judgments in the two cases was that under Regulation 101:—

- (1) the offence of "using" is an offence of absolute prohibition in the sense that no *mens rea* apart from user need be shown to constitute the offence;
- (2) while the driver of a vehicle on the road uses that vehicle so also does his master use the vehicle, whether that master be a private individual or a limited company, if it is used by the servant on his master's business;
- (3) the offence of "permitting the user" is an offence importing a state of mind, *i.e.*, knowledge. The court reaffirmed the authorities that knowledge in this connection includes not only actual knowledge but also "the state of mind of a man who shuts his mind to the obvious or allows his servant to do something in circumstances where a contravention is likely, not caring whether a contravention takes place or not." In the case of a company to satisfy this requirement it must be proved that some person for whose criminal act the company is responsible *permitted* as opposed to *committed* the offence. •

The result of this interpretation was that the company charged with permitting was not guilty whilst the company charged with using was guilty. A state of affairs when guilt or innocence under the same regulation may be determined by the selection of a particular expression by the person drafting the information can hardly be regarded as satisfactory. This result moreover prompts the expression of the opinion that the whole question of the determination of absolute prohibition or *mens rea* in the form of knowledge in summary offences is not appropriate to the circumstances and conditions of summary trial in magistrates' courts.



With regard to offences under the Road Traffic Acts or Regulations under the same formula of "uses or causes or permits to be used" we are apparently in the following position:—

- (1) Under Regulation 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, the offence of "using" is one of absolute prohibition whilst the offence of "permitting the use" requires knowledge: *James v. Smee*, *Green v. Burnett* [1954] 3 W.L.R. 631.
- (2) Under section 72 (10) of the Road Traffic Act, 1930, in relation to the offences of using or permitting the use of a vehicle as an express carriage without a Road Fund licence, the position is obscure. As regards "using," *Reynolds v. Austin* [1951] 2 K.B. 135 seemed to say that this did not constitute an absolute prohibition (cf. also Parker J. in *James v. Smee*, at p. 637) but there are dicta in *Browning v. J. W. H. Watson* [1953] 2 All E.R. 775, 778, limiting the effect of this. As regards "permitting the use," it seems that knowledge in some form or another is required, although there is an uncertain region as to how far there is vicarious liability and how far negligence is sufficient: *Evans v. Dell* [1937] 1 All E.R. 349; *Browning v. J. H. W. Watson* [1953] 2 All E.R. 775; *James v. Smee* [1954] 3 W.L.R. 631, 639.
- (3) Under section 35 (1) of the Road Traffic Act, 1930, in relation to the more serious offences of using or permitting any other person to use a motor vehicle not covered by third party insurance—an offence carrying the penalty of disqualification—the provisions constitute an absolute prohibition both as regards the offence of "using" and the offence of "permitting the use": *Morris v. Williams* (1951) 50 L.G.R. 308, *Lyons v. May* [1948] 2 All E.R. 1062.

In support of our suggestion that the lay justices, their clerks, and the public deserve better treatment we quote the statement by Devlin J. in *Morris v. Williams* (1951) 50 L.G.R. 308, at 313 (a case on section 35 (1) of the Road Traffic Act, 1930), concerning the difficult questions that arise under the Road Traffic Acts and Regulations:

"The question always to be considered, in regard to sections of this sort, is whether they impose an absolute prohibition or merely a prohibition subject only to proof of *mens rea*; and that consideration applies just as much when the Act expressly forbids the causing or permitting of another act as it does when it expressly forbids the act itself. The question is always solved by considering the construction of the language that the legislature has used, and by

having regard to the section as a whole, its place in the Act, to the Act as a whole and to the presumed objects and the intentions of Parliament.

"The words 'cause or permit' are used in other sections of this Act, in particular, section 72, which concerns road service licences, and provides in subsection (10) that 'If any person uses a vehicle or causes or permits it to be used in contravention of this section . . . he shall be guilty of an offence.' That was the subsection being considered in *Evans v. Dell* (1937) 35 L.G.R. 105, and I think that it may well be said that the construction there put upon section 72 and in cases which followed it, is that there must be *mens rea* before the offence of causing or permitting is made out; and I understand that to mean that there must be proof either of actual knowledge that the vehicle was being improperly used or proof of a wilful abstention from making inquiries; and that constructive knowledge would not be enough.

"But it does not in the least follow that, because that is the right construction of section 72, it is necessarily the right construction of section 35 or of any other section in the same Act where these words are used. The Act is a comprehensive one, achieving many different objects, and it may well be that in some parts of it Parliament must be taken to have intended a more stringent duty to be imposed than in others. In particular, if one examines section 72, which I do not propose to do because it has been done recently by this court, one sees many things in it which might well lead to the conclusion that Parliament did not intend to impose in that case an absolute prohibition."

We suggest that the minimum that is necessary for the efficient administration of justice in magistrates' courts is an interpretation section in any Act of Parliament which creates a summary offence defining precisely how far knowledge or negligence is required and how far vicarious liability is imposed.

A. LL. ARMITAGE.

#### CRIMINAL LAW—WHAT IS A CRIME?—ACTION FOR EXCISE PENALTIES

THE definition of a "criminal offence" has always been one of the more difficult problems of our law. It is, therefore, good to see a case relevant to that problem, *Brown v. All-Weather Mechanical Grouting Co., Ltd.* (Feb. 5, 1953) at last reported in the *Law Reports*, [1954] 2 Q.B. 443. The respondents were there charged with aiding and abetting the commission of an offence by their servant contravening section 13 (2) of the Vehicles (Excise) Act,



1949, namely that he used a goods vehicle for a purpose which attracted a rate of duty higher than that paid. It was argued that the company could not be found guilty by the magistrates of abetting anything which was not a crime, and that the section disclosed no criminal offence. The sanction provided was a penalty, and an action to recover that would be a civil proceeding. The Divisional Court agreed. Even though the word "offence" appeared in other similar sections, it did not follow that the acts prohibited were crimes; nor did the fact that the penalty could be recovered before the magistrates lead necessarily to that conclusion. This was a civil liability and the information had been rightly dismissed by the magistrates.

The learned Editor of the *Law Reports* tartly remarks in a footnote (at 446) that neither counsel cited *R. v. Justices of Appeals Committee of London Quarter Sessions* [1946] K.B. 176, "which may have some bearing on the question raised." In that case, informations were laid before a magistrate claiming excise penalties under the Finance Act, 1910, for alleged breaches of the licensing laws. An attempt to appeal to the Court of Appeal failed *in limine* because it was held that the order of the Divisional Court had been made in a "criminal cause or matter" within section 31 (1) (a) of the Judicature Act, 1925. Although that finding might well have influenced the court in *Brown's* case, it appears, upon investigation, to have less bearing than might be thought. The Crown has the option of recovering excise penalties either in the county court, or in the High Court, or before the magistrates. The first choice plainly involves civil proceedings (see County Courts Act, 1934, s. 75; County Court Rules, Ord. 46, r. 13 (7)).

Actions in the High Court derive from section 57 of the Excise Management Act, 1827, and from proceedings on information in the Court of Exchequer, exercising its revenue jurisdiction. Blackstone appears to have considered this jurisdiction to be civil (see Comm. III, 261-2, a passage more relevant than that cited in the 1946 case), and, after some doubt had been left by *Att.-Gen. v. Radloff* (1854) 10 Ex. 84, the Crown Suits Act, 1865, so declared it. Today the proper forum is the Queen's Bench Division, and the Crown Proceedings Act, 1947, has recognised and modernised the procedure (ss. 13, 14). Although recovery of penalties by this method may amount to "conviction of an offence" for some statutory purposes (*Att.-Gen. v. Still* (1927) 44 T.L.R. 102, also not cited in *Brown*), these proceedings are undoubtedly civil: *Att.-Gen. v. Bradlaugh* (1885) 14 Q.B.D. 667; *R. v. Hausman* (1909) 3 Cr.App.R. 3.

After the Act of 1827 excise penalties were recoverable before

justices on information, except in London, where the Commissioners had jurisdiction until 1890. The latter clearly exercised a civil jurisdiction (see, *e.g.*, Excise Management Act, 1841, s. 26); but it is submitted that proceedings before the justices were always regarded as criminal. In the 1946 case the Court of Appeal was pressed with the absurdity of holding that such proceedings gave rise to a criminal cause, when the Crown might have proceeded in the High Court and converted the case into a civil matter. The court was not daunted. "The English cases," said Tucker L.J. in delivering its judgment, "show that the form of the proceeding is the test, and this seems to be a conclusive answer to the apparent anomaly." It is an answer, of course, if the magistrates might impose punishment for the offence, and this was assumed to be so. In *Brown's* case Goddard L.C.J. seems to challenge that assumption, for he says (pp. 447-8): "Of course, once penalties have been imposed, if they are not paid there may be proceedings under the Debtors Act and many other Acts, and possibly under the Summary Jurisdiction Acts, and a committal to prison may be made, but that is because the penalty has not been paid. It is not a punishment for the offence itself." This, added to his remark later that actions for penalties should be brought by complaint, suggests that the whole matter is one of civil debt, *e.g.*, under sections 6 and 35 of the Summary Jurisdiction Act, 1879 (now section 50, Magistrates' Courts Act, 1952). That may be true where the statute makes its intention clear, and provides for action by complaint (*R. v. Kerswill* [1895] 1 Q.B. 1). But under the various excise Acts, *e.g.*, section 65 of the 1827 Act, proceedings are on information, and that appears to exclude sections 6 and 35. The 1879 Act, s. 53, applied the procedure of the Summary Jurisdiction Acts to excise cases: in respect of default, section 5 of the 1879 Act, and sections 19-22 of the 1848 Act. The scale of imprisonment in default of payment has always been different in excise cases, and the sections dealing with that have plainly treated the matter as criminal (see section 53 of the 1879 Act and section 12 (4) of the Finance Act, 1948; and now the Magistrates' Courts Act, 1952, Sched. 3 (3)). Similar considerations have led courts to the conclusion that such proceedings are criminal (even on complaint in *R. v. Paget* (1881) 8 Q.B.D. 151); and in accordance with the usual approach, to the conclusion that the offence involved is criminal (*Rayson v. South London Tramways* [1893] 2 Q.B. 304). The 1946 case confirmed the first conclusion.

But definition by reference to the form of procedure must break down if the "wrong"—to use a neutral expression—can be remedied in either civil or criminal proceedings. If the previous



argument is correct, that was the position in *Brown*, and the court was in error in cutting the knot by calling all excise proceedings civil. To that extent the decision is weakened. But the 1946 case does no more than confirm that error, and is of no assistance in answering the question: "Is this wrong, so variously remediable, a crime or not?" Certainly the essential nature of the liability should not wait upon the Crown's choice of forum. It is submitted that the decision, if not the reasoning, in *Brown's* case is desirable, if for no other reason than that it accords well with the presumption against the creation of new crimes by statutes which are ambiguous in that respect: cf. Brett M.R. in *Att.-Gen. v. Bradlaugh* (1885) 14 Q.B.D. 687, 689. The fortuitous transfer of excise cases to justices in 1827 and 1890 should not turn every person liable to excise penalties into a criminal. Unhappily, since the proceedings in *Brown*, the earlier jurisdiction and the Excise Acts have been largely repealed and replaced by the Magistrates' Courts Act, 1952, and the Customs and Excise Act, 1952. The learned editor of *Halsbury's Statutes* (Vol. 32, p. 875n.) comments that section 283 of the latter ". . . abolishes the fiction that proceedings for customs and excise offences are civil." It is submitted that, so far as excise offences are concerned, the section has, on the contrary, confirmed that the summary proceedings are criminal, but that nothing has yet appeared to affect the decision in *Brown's* case that the liability is essentially civil.

What is odd, however, is that the prosecution might have avoided all difficulty by taking action against the company for the penalty, since the company seems to have "used" the lorry through its servant: see *James v. Smee* [1954] 3 W.L.R. 636, discussed in the preceding note.

K. W. WEDDERBURN.

#### INTERNATIONAL LAW—SOVEREIGN IMMUNITY—PROOF OF INTEREST

THERE is little in the case of *Juan Ysmael & Co. Inc. v. Government of Indonesia* [1955] A.C. 72, except the outcome, to satisfy those who seek, in every rejection by the English courts of a plea to the jurisdiction, evidence of the declining force of the doctrine of State immunity. The general principle of sovereign immunity is that a foreign government may not be impleaded in the English courts without its express consent. A number of decisions have elaborated the meaning of the term "implead." In particular, as a result of the decisions of the House of Lords in *The Cristina* [1938] A.C. 485 and in *U.S.A. v. Dollfus Mieg et Cie.*

[1952] A.C. 582, it is now clear that a foreign government is considered to be impleaded if property of which it is the owner or of which it is in possession or control is made the subject either (i) of an action *in rem* or (ii) of an action *in personam* by the judgment in which its proprietary or possessory rights might be affected.

One question, however, has caused and, it appears, will continue to cause some difficulty: What happens when the very issue in the action which the foreign sovereign seeks to stay is the existence of these proprietary or possessory rights which constitute the basis of his claim to immunity? Although this problem does not often arise, for in most cases it has been common ground between the parties that the property under litigation is in the ownership, possession or control of the foreign sovereign or State, can the foreign sovereign in such a case merely assert a claim of ownership or possession of the property in question and thus terminate the proceedings? Hitherto there has been some authority for suggesting that the answer to that question is Yes, for observations to that effect were made both by Hill J. and by Scrutton L.J. in *The Jupiter* (No. 3) [1927] P. 122 at 138 and [1924] P. 236 at 244. This is clearly the logical and simple answer if the absolute doctrine of sovereign immunity is to be preserved. However, in *The Cristina* both Lord Wright and Lord Maugham expressed disagreement with that answer but did not indicate positively what the correct answer should be.

The point was raised shortly afterwards in *Haile Selassie v. Cable and Wireless, Ltd.* [1938] Ch. 839. In that case the defendants had pleaded in their defence that the debt which was the subject of the action was claimed also by the Italian Government which refused to become a party to the action. In those circumstances Bennett J. stayed the proceedings. This judgment was reversed in the Court of Appeal when Sir Wilfrid Greene M.R. said: “. . . but where property which is not proved or admitted to belong to, or be in the possession of a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned . . . So far as principle is concerned, the present action does not seek to bring His Majesty the King of Italy before the court, nor does it seek to interfere with *any proved or admitted* proprietary or possessory right belonging to him ” (italics supplied). It was clearly the view of the Master of the Rolls that if the ownership or the possession of the property in question had not

been admitted or otherwise established as being in the foreign sovereign, he had, if he desired to protect his alleged interest, to come in as an ordinary litigant and establish it. Subject to the decision in *The Arantzazu Mendi*, to which reference will be made later, this appears to have been the state of the law when *Juan Ysmael's* case arose.

Juan Ysmael and Co. were in 1950 the undisputed owners of the *S.S. Tasikmalaja*. In 1951 they chartered the vessel to the Government of Indonesia by the first of a consecutive series of charters, the last of which expired on June 30, 1952. Under none of these charters did the Indonesian Government acquire possession of the vessel. However, in February, 1952, the Government of Indonesia purported to purchase the vessel from an agent of the owners, although the representatives of the Government well knew that the agent was exceeding his authority. There was, therefore, no valid sale to the Government. Nevertheless, during the currency of the last period of charter the vessel was, on the orders of the Government, brought to Hong Kong for repair. On June 27, 1952, the plaintiffs issued a writ *in rem* against the vessel. The Indonesian Government entered a conditional appearance and on July 9, 1952, gave notice of a motion for an order that the writ be set aside on the ground that it impleaded a foreign sovereign State and that the Government of Indonesia was the owner, or was in possession or control, or entitled to possession of the vessel. In support of this motion the Government filed a number of affidavits, which, nevertheless, amounted to no more than a "bare" or "mere" claim to the vessel; for it was clear that at the date when immunity was pleaded the Indonesian Government had no title to the vessel of any kind; the period of charter had expired nine days earlier and the purported purchase of the vessel was invalid.

On these facts the Privy Council held that the title of the Government of Indonesia was "manifestly defective" and that it had not, therefore, established that it possessed such an interest in the vessel as would show that it had been impleaded. This conclusion was entirely consonant with the judgment in *Haile Selassie's* case and could have been justified by reference to the observations of Sir Wilfrid Greene M.R. referred to above. However, the Board expressed its views in wider terms. "In their Lordship's opinion," said Earl Jowitt (who delivered the judgment of the Board), "a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title



manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached."

If that is the law of England—and although judgments of the Privy Council are not, strictly speaking, binding on other courts in England, they enjoy the greatest authority—then it seems that the law has placed itself in a position which is dictated by considerations neither of logic nor of expediency. The passage from the judgment cited above clearly anticipates three distinct legal situations. In the first situation, the proprietary or possessory title of the foreign government to the property in issue may be proved or admitted. In that event, subject to any legal argument as to the consequences of establishing that title, the proceedings are stayed. Secondly, the ownership, possession or control by the foreign government of the property in question may not only be not admitted: it may be manifestly defective. In this case, the claim to immunity is denied. Lastly, the title of the foreign government, though not "merely illusory" nor "*manifestly* defective," may nevertheless be bad and unsustainable. Yet, in such a case, in the view of the Privy Council, the foreign government is entitled to immunity. In other words, if the foreign government can produce *prima facie* evidence of title—whether proprietary, or by way of possession or control—it will succeed in preventing the merits of that title from being examined.

While the consequences which follow from either of the first two situations are, it is believed, correct both on principle and on precedent, the same cannot easily be said of the view that if the third situation arises the foreign government is entitled to immunity. "Impleading" is a technical concept; a person either is or is not impleaded as a result of the institution of proceedings. If he is impleaded it is because the law recognises that there exists a legal connection between him and the proceedings which have been started. If a person seeks to show he has been impleaded, he must demonstrate the validity of this connection. If he cannot make this demonstration, or is unwilling to, he must accept that he has not been impleaded. To hold otherwise is to introduce into the law of State immunity as applied in England a method whereby an unscrupulous, negligent or inefficient foreign administration may, without good reason, impede the determination by English courts of title to property situated within their jurisdiction. Such a development was not required by precedent, as a close analysis of the authorities referred to in the judgment will show. For example,

the passage cited by the Board from the judgment of Goddard L.J. in *The Arantzazu Mendi* [1939] P. 37 at p. 55, was not only *obiter*: it was directed towards the question whether the control arising out of the fact of requisition (which had been established) was sufficient in law to invest the vessel with the immunity of the requisitioning authority. It was not directed towards the question whether a mere assertion of control was sufficient to establish the fact of control. Nor was such a development required for the Privy Council to do justice in this particular instance. In these circumstances, it is to be hoped that English courts, should similar circumstances arise in the future, will be able to resist claims to immunity founded upon an assertion of title coupled with nothing more than *prima facie* evidence of such title. As it stands, however, the *obiter dictum* of the Privy Council in this case cannot readily be regarded as other than a departure from the recent tendency of that tribunal, as manifested in the judgment in the *Sultan of Johore v. Abubakar* [1952] A.C. 318, to restrict the application of the doctrine of sovereign immunity.

E. LAUTERPACHT.

#### TORT—MAINTENANCE—COSTS PAID BY CO-OPERATIVE ASSOCIATION

THE tort and crime of maintenance is defined by Blackstone (*Commentaries*, iv, 134) as “an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.” Being an abuse of legal process it has for many centuries been discouraged by the law, and though as a crime it may be said to be obsolete in the sense that no prosecutions are undertaken in modern times, yet as a tort it is not altogether neglected today. Actions for damages for maintenance are, however, rare, and other remedies are still more rarely sought. Indeed in a recent pollution case, *Martell v. Consett Iron Co., Ltd.* [1954] 3 W.L.R. 648 (affirmed on appeal, *The Times*, February 4, 1955), an attempt to stay the proceedings on the score of maintenance seems to have been entirely novel.

In this action the plaintiffs were a riparian owner and the trustees of a local angling association which leased the fishing rights in a portion of the river Derwent, which they claimed was seriously polluted by effluents from the works of the defendant company. The company's contention was that the action was being improperly maintained by the Anglers Co-operative Association (of which the local association were members), particularly in that the Anglers Association had given indemnities to the plaintiffs to cover any

costs of litigation. Danckwerts J. rejected this contention and dismissed the company's application to stay the action. The Court of Appeal (Jenkins and Hodson L.JJ., and Vaisey J.) agreed with him.

The judgment at first instance is distinguished by a thorough review of the precedents. The books clearly establish that there are not a few justifications for intervening in litigation, such as near relationship between maintainer and litigant, assistance for the poor, or common interest in the subject-matter of the suit. Winfield (*Tort*, 6th ed., pp. 761-5) points out that many of the defences mentioned in the old cases are very vague. So when it is said that friendship and courtesy justify intervention, then unless this is confined to mere neighbourly advice, the justification would seem quite at large and indeterminate. Professional legal advice and assistance naturally have never attracted liability. Today possible defences are numerous, but, says Winfield, "no general principle underlies them and some of them are so destitute of modern authority that it is impossible to be sure how far they still exist."

The justification in the instant case was bona fide community of interest, the legitimate interest in preserving the purity of river water, no mere "sentimental" interest which is not sufficient. An allowable interest certainly need not be commercial in character and it has been held (*Holden v. Thompson* [1907] 2 K.B. 489) that the interest arising from community of religion justifies a man helping his co-religionist in a dispute relating to religious matters. Though it must be remembered that "a common cause is not a common interest" (*per* Lord Sumner [1914] Ch. at p. 106), it cannot be denied that the notion of common interest is pretty loose. In the opinion of Jenkins L.J., the range of relevant interests is potentially of great width, and he did not wish to limit it by strict definition. Perhaps this is as well, for laxity in definition, as in the jurisdiction over fraud and undue influence, reserves a discretion to the judges, and here enables them to adapt as far as possible to modern conditions "a cumbersome curiosity of English law," as Lord Dunedin once called the action for maintenance ([1920] A.C. at p. 977). Public policy, according to Danckwerts J., is still here an acceptable guide in formulating fresh limits of liability. Jenkins L.J. was careful, however, to deny that precedents could be disregarded because of changes in public policy or in the social and economic background. He was referring to decisions during the last century, for it is evident that the scope of the tort has been limited with some severity since the times of the Yearbooks in the pages of which the offence of maintenance figures frequently.



Thus in 1450 Fortescue C.J. was prepared to hold that a man who volunteered to give evidence was guilty of maintenance, because he ought to have waited till the jury visited him, as they then seem to have been expected to do, to ask him what he knew (Y.B. Pasch. 28 Hen. VI, f. 6, pl. 1).

Today we are far removed from the social background which fostered the fear of maintenance in medieval times. Though certain remedies for abuse of legal process are rightly and fairly entrusted to private individuals, e.g., the action for malicious prosecution, generally at this day the dangers of abuse would seem best met by the exercise of summary jurisdiction in the court. The High Court has wide powers, derived from inherent jurisdiction, statute and its own rules, to counter abuse of its own process, but so far as maintenance is concerned the position is not clear, for Danckwerts J. and the Court of Appeal declined to approve a stay of proceedings as an appropriate remedy; and in 1919 Atkin L.J. had reserved his opinion on this point (*Wild v. Simpson* [1919] 2 K.B. at p. 564). As maintenance is, theoretically at all events, a crime, such a course might amount to trying an accused person in his absence. Moreover it is indicative that the illegal maintenance of the plaintiff in an action is no defence to that action. For the possibility of an injunction see *Baker v. Jones* [1954] 2 All E.R. 553. The right to sue for damages for maintenance, however, is unquestionable; and it is on this that many of the most difficult problems in the tort arise. Thus in *Neville v. London Express Newspaper Ltd.* [1919] A.C. 368 the House of Lords decided by three votes to two that special damage must be proved, and also, by a differently constituted majority of three to two, that the success of the action maintained, either by way of action or defence, is no bar to an action for damages. The Lord Chancellor at p. 308, however, says "it cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them." And his colleagues agreed with him. This seems to be an obstacle for the plaintiff seeking damages for maintenance if he in fact lost the maintained suit.

Probably the most rewarding aspect of the tort is the historical one. Here too there are uncertainties. It is doubtful whether maintenance was illegal at common law (Winfield, *History of Conspiracy and Abuse of Legal Procedure*, pp. 138-150). Nevertheless despite certain statutory prohibitions, it has been generally accepted since Coke's day (2 Inst. 212) that it was and is wrongful at common law. Another interesting question is the impact of the tort on the law governing assignment of choses in action. Though the chief

and perhaps the original cause of discountenancing such assignments at common law was the intensely personal nature of the contractual tie in the view of early lawyers, the fear of maintenance was not a negligible influence (Y.B. Hil. 34 Hen. VI, f. 30, pl. 15, *per* Prisot C.J.). Finally, a very general interest lies in the adapting of old rules to new circumstances and in the consequent creation of new law, a long process not so much, in this tort, of judicial legislation as judicial repeal. So the common law has kept contact with the needs of society, though at the expense of being tidy. As torts are one of the untidiest parts of the common law, so among torts maintenance is perhaps the untidiest.

D. E. C. YALE.

TRUST—RULE IN *LASSENCE v. TIERNEY*—DOUBT AS TO INITIAL GIFT

THE decision of Roxburgh J. in *Re Burton's Settlement Trusts, Public Trustee v. Montefiore* [1955] 1 Ch. 60, concerns an established rule of construction usually known as the rule in *Lassence v. Tierney* (1849). In his judgment, Roxburgh J. terms it the rule in *Hancock v. Watson* [1902] A.C. 14; for in that case (among others) the rule was recognised by the House of Lords. It is a rule of construction applicable both to settlements *inter vivos* and to wills.

The rule concerns a gift which, purporting at the outset to be an absolute and beneficial gift, is followed by a direction that it be held upon certain trusts. The deed or will thus contains an apparent inconsistency or contradiction which raises a problem of construction. The rule solves that problem by reading the gift and the trusts together so as to mean, unless a contrary intention be shown, that the trusts are to operate so far as they are effective and the gift is to operate in so far as the trusts are ineffective. In other words, the normal implication of a resulting trust to the settlor or to the testator's estate, when declared trusts fail or do not exhaust the subject-matter, is displaced in favour of the original donee.

In practice, this peculiar combination of an ostensibly beneficial gift and trusts engrafted upon it is usually a gift to or upon trust for X followed in a later clause by a statement that it is not to vest absolutely in him but is to be retained by the trustees upon certain specified trusts for him and his children or issue. That was very nearly the situation in *Burton's settlement*. The settlor had created in 1919 a trust fund for his two daughters Audrey and Ida equally, and then, in a later clause of the settlement, had proceeded to direct that "the share of the trust fund of each of the said two daughters

shall not vest absolutely in such daughter but shall be retained by the trustees upon the trusts following"—then followed detailed trusts for each daughter for life and for her children or remoter issue. In fact the latter trusts eventually failed, for each of the two daughters afterwards died without issue and indeed without ever having married. Accordingly, if the rule in *Lassence v. Tierney* had applied here, the result would have been—if we ignore for the moment an accruer clause to be mentioned hereafter—that at the death of either daughter the original beneficial gift to her would take effect so that her estate would get her half-share of the fund. Roxburgh J. decided, however, though "with hesitation," that on the true construction of the supposed original gift to each daughter there was in fact here no original gift to her at all. Consequently the rule in *Lassence v. Tierney* did not apply; and so, on the failure of the prescribed trusts, a resulting trust arose which carried the fund back to the settlor.

There was already abundant authority, of course, that the rule does not apply unless one finds at the outset what appears to be an absolute gift. The difficult question in *Re Burton's Settlement* was whether the initial words did purport to make such a gift and (one would suppose) whether, if their meaning is not very clear, one is at liberty to rely in the customary fashion upon hints extracted from other parts of the settlement including even the various trusts prescribed by the later clauses. The peculiarity of the initial words in the Burton settlement was that the trustees of the fund were directed "to divide the trust fund *or without actual division to treat the same as divided* into two equal parts and to appropriate one of such parts as the share of each of the said two daughters." Those words, in isolation, were held capable of meaning (i) that each daughter was thereby given a half-share of the fund or (ii) that for some reason as yet undisclosed the settlor wished the trustees to treat the fund as though divided into two imaginary shares. Having thus concluded that the words of this initial clause did not clearly indicate in themselves that each daughter was to have a share of the fund—though surely a direction to appropriate an undivided fraction of a fund as X's share hints very strongly of a gift to X—the learned judge proceeded to find, among the trusts which followed, indications of intention which enabled him to construe those initial words as merely administrative provisions not intended of themselves to give the daughters anything.

It is of course to be expected that when, in a *Lassence v. Tierney* situation, one looks at the trusts subsequently engrafted upon a gift to be shared among children one will be able to find in them some indication that the shares were given for an administrative reason—



namely, in order that the trusts might be engrafted upon them. According to the ordinary canons of construction, however, it would seem that one ought not as a rule to be influenced by the rest of a document when construing a clause which is sufficiently clear and workable as it stands: see *e.g.*, Hawkins on *Wills*, 3rd ed., p. 3. Apparently, therefore, the crucial part of the decision in *Re Burton's Settlement Trusts* is that the learned judge was not satisfied that the original clause had a clear meaning when read alone: see *Hancock v. Watson* [1902] A.C. at p. 22.

The trusts declared for each of the two "shares" of the fund concluded with an accruer clause whereby "if the trusts hereinbefore declared concerning the share of either such daughter shall fail then . . . such share shall go and accrue by way of addition to the share of such other daughter and shall be held upon the trusts . . . herein declared and contained concerning her original share." Thus, on the death of Audrey (who died first), her notional share accrued to the notional share of Ida and became subject to its trusts.

Since the decision of the Court of Appeal in *Re Litt* [1946] Ch. 154, it had been clear that the rule in *Lassence v. Tierney* and a suitably worded accruer clause can work together. If the Burton settlement had begun with a clear absolute gift of a half-share to each of the two daughters and, after engrafting the trusts, had ended with an accruer clause identical with that which was used in *Re Litt*, the result would have been as follows:—(i) at Audrey's death without issue the accruer clause would have carried her half-share to Ida, so that Ida would now have (as in her original half-share) an absolute gift of it subject to the trusts for her issue; (ii) and afterwards, when Ida herself died without issue so that those trusts failed, the rule in *Lassence v. Tierney* would have brought her absolute gift (now of the entire fund) into full force, and so Ida's estate would thus have become entitled to the whole fund absolutely and unconditionally.

In fact, however, the wording of the Burton accruer clause was slightly different from that in *Re Litt*, for it said that Audrey's share was to accrue to Ida's "share"—not to Ida herself. On this fine distinction, Roxburgh J. (quoting a passage from Greene M.R. in *Re Litt*) took the view that the accruer clause here could not have carried to Ida an absolute interest in the deceased Audrey's half-share. Consequently, if one were to read the initial clause of the Burton settlement as conferring absolute gifts upon the two daughters so that the rule in *Lassence v. Tierney* would apply, the result would be a strange one. For the result then would be that (i) at Audrey's death, her share would accrue to Ida's share for the purpose only of Ida's trusts so that she would obtain her life

interest now in the whole fund; but (ii) when Ida in turn died, the fund would have to be divided again in order that (*Lassence v. Tierney* operating on each share separately) each daughter's estate should get absolutely her own half-share according to the (supposed) original gift to her.

This latter part of the judgment is closely reasoned and somewhat difficult to follow. It proceeds by process of *reductio ad absurdum*. The fact that to construe the first clause as giving absolute interests to each daughter would require a redivision of the fund, after its shares had been blended together as required by this accruer clause, was held to support the conclusion that the settlor had never intended that the first clause should confer absolute interests.

*Note:* The above decision has now been reversed by the Court of Appeal, [1955] 2 W.L.R. 452, on the ground that the initial clause was of itself capable of carrying to each daughter a beneficial gift of her "share" and that the other clauses of the settlement were consistent with, and indeed supported, that construction. Accordingly, the rule in *Lassence v. Tierney* (or in *Hancock v. Watson*) was held to apply. Whether, on analogy to *Re Litt*, the accruer clause here, when Audrey died childless so that her trusts failed, had carried her original share permanently to Ida, was immaterial—for Audrey had bequeathed to Ida all her property. The *dicta* of the Court of Appeal hint that it did not, and that the facts of *Re Litt* and the form of its accruer clause should be regarded as abnormal. Ordinarily, it would seem, the accrual would merely subject Audrey's share to Ida's trusts; and so, when those trusts in their turn fail, the share would fall back into Audrey's estate.

S. J. BAILEY.

TRUST—CONDITION SUBSEQUENT—SETTLEMENT OF SPES  
SUCCESSIONIS—FRAUD ON A POWER

THE decision of Upjohn J. in *Re Burton's Settlements*, *Scott v. National Provincial Bank* [1955] 1 Ch. 82, related to a complicated set of facts and documents and to problems of fraud on a power, uncertainty of conditions subsequent, and assignment of *spes successionis*.

The problem of the condition subsequent was that the testator's will and codicil, having bequeathed to each of the two daughters of his second marriage a share of his residuary estate, added a clause of forfeiture in case she should not settle certain other property within (if an infant) six calendar months after attaining

her majority "or within such further period as my trustees shall think reasonable." Applying the distinction which Jenkins J. had deduced from the authorities in *Re Coxen* [1948] Ch. 747, at p. 760, the learned judge held this clause valid: the events in which a forfeiture was to occur were clear enough, and the difficulty of ascertaining whether those events have happened or not can be readily solved by the trustees or the court.

One of the daughters, mistakenly believing that the above forfeiture clause required her to settle certain property which her mother might eventually appoint to her, purported to settle both it—a mere *spes successionis*—and some other property which the forfeiture clause clearly required her to settle. She now contended that her settlement so far as it related to the *spes successionis* was ineffectual, in that it was not made for valuable consideration. Upjohn J. held nevertheless that her conscience was affected, since she had made the settlement in order to comply with the forfeiture clause. This part of the judgment (p. 103) is not entirely clear: perhaps it rests upon the fact that she was undoubtedly receiving consideration (freedom from the forfeiture clause) as regards the other property which she was settling at the same time and by the same settlement. However, the learned judge gave a second ground for his decision, namely that her settlement did not purport to convey her *spes successionis* to anyone but was framed simply as a direction to the trustee (the National Provincial Bank) who was already holding the fund that might afterwards be appointed to her: her settlement had merely directed this trustee to *retain* upon certain trusts any share of the fund which her mother might appoint to her. Accordingly, said Upjohn J., "the assistance of a court of equity is not required, since the bank [the trustee] already holds all the relevant funds." With respect, this line of reasoning seems questionable. One would have thought that, so long as no appointment has been made to her, she is free to revoke the (supposedly voluntary) instructions which she gave to the trustee: see, e.g., *Re Bowden* [1936] Ch. 71. Surely, neither a *spes successionis* nor a possible but unknown fraction of a known fund is capable of being held upon trust.

The question of fraud upon a power arose as follows. By virtue of a family settlement which he had made in 1915, the testator had a power of appointment among such of his issue *as should be born in his lifetime*. In 1930, in a long codicil to his will, he began by appointing this fund equally between the children of his second marriage (in the event, two daughters). Towards the end of the codicil he bequeathed, as we have seen, his residuary estate equally



between the children of his second marriage, directing that the share of any daughter should be held upon certain trusts for her and her issue. And finally, he added the forfeiture clause whereby any daughter who should fail (within six months, etc.) to settle in like fashion what he had herein appointed to her should forfeit her share of his residuary estate. Evidently he was a testator who firmly believed that any property left to a daughter should be settled so as to pass, on her death, to her issue. In disposing of his own residuary estate he could and did himself make such a settlement for her. But in exercising the power of appointment he was precluded from doing so, since its terms restricted him to issue born in his own lifetime and neither of his daughters had in fact any issue until after he was dead. He therefore adopted the device of requiring the daughters, on pain of forfeiting their shares in his residuary estate, themselves to settle what he had appointed to them.

On virtually identical facts, Vaisey J. in *Re Simpson, Chadderton v. Simpson* [1952] Ch. 412, had held the appointment void as a fraud upon the power. In spite of a dictum to the contrary by Farwell J. in *Re Neave* [1938] Ch. 793, Vaisey J. had reached the conclusion that an appointor who employs this device is appointing with intent to benefit not only permissible objects of the power (the daughters) but also non-objects (their issue). He therefore held that it fell within the classic words of the judgment of the Privy Council, delivered by Lord Parker, in *Vatcher v. Paul* [1915] A.C. 372, at p. 378: "It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power."

Nevertheless, Upjohn J. declined to follow *Re Simpson* and upheld the appointment. He had before him a number of authorities, from the year 1755 onwards, which do not appear to have been cited before Vaisey J.; and he concluded, in the light of those authorities, that Vaisey J. had interpreted Lord Parker's words too literally and had been mistaken in thinking that greater emphasis is laid upon the doctrine today than in the past. The authorities such as *Duke of Portland v. Topham* (1864) 11 H.L.Cas. 32, *Roach v. Trood* (1876) 3 Ch.D. 429, and *Re Holland* [1914] 2 Ch. 595, show that in every case one must simply determine whether there has been a "genuine appointment to an object of the power" (p. 99). One does this by deducing from whatever evidence is available what was the appointor's "real purpose and intention" (pp. 100-101). If it is clear that the real purpose and intention of the appointment was to benefit the object-appointee, the fact that

the appointor has imposed conditions intended to compel the appointee to make certain payments or (as here) to settle the property so that some non-objects may get a benefit does not constitute a fraud upon the power so as to make the appointment void. The appointment is good in spite of the conditions. Even the conditions themselves are good if annexed (as here) to a gift of other property: they would be bad, as an excessive execution of the power, only if annexed to the enjoyment of the appointed fund.

Accordingly, having analysed the general scheme of the testator's will and codicil and having deduced from it that the appointments to the daughters were genuine appointments intended to benefit them, the learned judge declared that both the appointments to the daughters and the conditions imposed upon the residuary gifts to them were valid and effectual.

S. J. BAILEY.

EQUITY—PRIORITIES—BETTER RIGHT TO LEGAL ESTATE

*Assaf v. Furwa* [1954] 3 W.L.R. 552 (J.C.) is a collector's piece, for it turns on a rare but important point of equity which no English decision illustrates so clearly: the rule that the purchaser without notice of an earlier equitable interest may take priority over it, even without obtaining the legal estate, provided that he has "a better right to the legal estate." Such a "better right" must of course be an equitable right, and it is not obvious how such an equity can displace another equity which is prior in time. Standard works on equity barely mention the doctrine, still less explain it.

The English authorities tend to be complicated by trusts of outstanding terms or long chains of mortgages, with or without further ornamentation from the old rules about tacking securities. They culminate in *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231, where the Court of Appeal unravelled a skein of fraudulent dealings which surpassed in intricacy all the previous cases put together. The facts in *Assaf v. Furwa* were refreshingly simple. The owner of land in Nigeria mortgaged it, and so vested the legal estate in the mortgagee. He later agreed to sell the land to A for £1,600. Later still he agreed to sell the land to B for £2,700, and he purported to cancel the sale to A, although A had by then accepted the title and paid the £1,600. B paid the £2,700, out of which the owner paid off the mortgage and so became entitled to a reconveyance of the legal estate from the mortgagee (but no reconveyance took place). Finally the owner purported to convey the land to B. A obtained an order against the owner for specific

performance, but B's executors claimed priority and it was the owner's action against them for possession which eventually came before the Privy Council.

The West African Court of Appeal accepted the defendants' contentions that B had no notice of the sale to A, and that by virtue of the discharge of the mortgage shortly before the "conveyance" to B the more immediate title to the legal estate was obtained by B. On this second point the Judicial Committee, in an opinion delivered by Lord Porter, allowed the appeal, holding that a better right to the legal estate could be established only by "some positive act by the mortgagee operating in favour of the claimant." It would have sufficed if the mortgagee had made an express declaration of trust in his favour, or had joined in the conveyance to him, or had given him the title deeds; but here the mortgagee had entered into no relations whatever with the claimant, who therefore had no special title to the legal estate which could reverse the normal order of priority.

This conclusion is in accord with the earlier cases, and it is satisfactory that no extension has been given to a doctrine which might otherwise undermine the fundamental rule that equitable titles take priority in order of time. There is no clear case in the reports of this natural order having been upset by a plea of "better right to the legal estate" since *Wilkes v. Bodington* (1707) 2 Vern. 599, although it has been said that the same principle was applied in *Taylor v. London and County Banking Co.* (see below). The plea is available only where there has been some special transaction between the claimant and the owner of the legal estate, so that in equity the claimant can be regarded as a direct assignee. The legal estate, furthermore, must be outstanding in some third person, who at the time of the special transaction has no notice of the earlier competing equity; for otherwise the equity created by the assignment would be subject to the earlier equity, the legal estate already being held on trust for the earlier incumbrancer. If A is expressly made trustee for B, no later declaration of trust or other equitable disposition by A can give C priority over B; but if the legal estate is outstanding in X, and both X and C know nothing of B, C can secure priority by taking a declaration of trust from X, for equity looks upon this as an effective getting in of the legal estate. Perhaps the best passage on the subject is the judgment of Wigram V.-C. in *Wilmot v. Pike* (1845) 5 Hare 14 at 22, which was approved in principle in *Rooper v. Harrison* (1855) 2 K. & J. 86 at 106. Speaking of a situation where, as so often in the older cases, a term of years was outstanding in a trustee, the Vice-Chancellor said that the authorities established "that, as to the



trusts of a term, a declaration in form by a trustee, that he will stand possessed of the term, is held equivalent to an assignment, so as to give preference to the party who gets the declaration over one who has a good equitable interest but not in the same form."

Absence of notice is of course essential not only in the trustee, but also in the person in whose favour the trustee makes the declaration; for otherwise the plea of purchase without notice must fail altogether. The exception which was well known in the old doctrine of tacking securities, now abolished by section 94 of the Law of Property Act, 1925, depended on the theory that the later equitable security could share the priority of the earlier legal security—a theory which, like several other equitable doctrines relating to mortgages, could be said to run counter to the canons of equity in its technical as well as in its ethical sense.

The emphasis placed by the older cases, and by the present decision of the Privy Council, on the need for some active step on the part of the trustee of the legal estate—as opposed to "mere inertia or passivity"—helps to sharpen the distinction between the rules which govern real and personal property. In the case of pure personalty the priority of equitable claimants is determined by the order in which they give notice to the person in whom the legal title is vested: *Dearle v. Hall* (1823) 3 Russ. 1. Here the trustee may be as inert as a letter-box, which is what in effect he is. But this rule has never applied to real property (except now at one remove under section 137 of the Law of Property Act, 1925), and a "better right to the legal estate" cannot therefore be established by giving notice to the trustee. As against an *earlier* equitable incumbrancer a mere notice will have no effect: only an express declaration of trust, or some other positive act of assurance by the trustee can affect the priorities. But it is nevertheless worth while to give notice, as puisne mortgagees commonly do, for it will protect the giver against a *later* incumbrancer, who might otherwise obtain such an assurance from the trustee in ignorance of the intervening interest. For the notice makes the trustee an express trustee for the claimant, and it therefore becomes impossible for the trustee to promote over his head any later claimant whose claim is equitable only.

A final question is whether *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231 really provides an example of a successful plea of "better right" which can be set beside *Wilkes v. Bodington* after a gap of two centuries. To disentangle the facts of *Taylor's* case would take more than a note, but the essence of them appears to have been that the successful trustee, N, had become purchaser

of a legal estate without notice of a previous trust, and thereby obtained priority for his beneficiaries. Later his co-trustee conveyed the property (by attorney) to the bank, so passing one moiety of it at law, but before the conveyance the bank had notice of the trusts upon which N held. Stirling L.J. (at 263) referred to the authorities for the "better right" doctrine, and (at 264) held that N had made out a better right to the legal estate (vested in the bank) than had the trustees of the previous trust. But this "better right" would seem to have derived from the earlier purchase of the legal estate without notice, which settled the priority between the two trusts for good and all. The legal estate was not outstanding at the time, and it was only later that a moiety of it became vested in the bank, subject to notice—and the bank had notice of the second trust but not of the first. If this analysis is correct, there was no occasion for applying the doctrine to which Stirling L.J. referred. Maitland (*Equity*, revised ed., 136) evidently took it to apply, but his account gives the *beneficiaries* the "better right" whereas Stirling L.J. gives it to the *trustees*. But it must suffice for the present merely to draw attention to this doubtful point.

H. W. R. WADE.

GIFT—PARENT AND CHILD—PRESUMPTION OF ADVANCEMENT

THE decision of the Court of Appeal in *Re Shepherd, Shepherd v. Cartwright* [1953] 1 Ch. 728 (noted in [1954] C.L.J. 57) has been reversed by the House of Lords *sub nom. Shepherd v. Cartwright* [1954] 3 W.L.R. 967. It will be recalled that, out of a complicated set of facts, a relatively simple question of law required determination. That question was whether evidence of a father's subsequent acts and declarations, which took place in 1934, was admissible to rebut the presumption of advancement which had arisen in favour of his children when, in 1929, he caused shares in a company to be registered in their names. The answer to that question given in the textbooks was unequivocal and was to the effect that neither subsequent acts nor subsequent conduct was admissible (see Lewin, *Trusts*, 15th ed., p. 152; Underhill, *Trusts*, 10th ed., p. 187; Snell's *Equity*, 24th ed., p. 153).

In the Court of Appeal Denning L.J. had cast doubt on the accuracy of these statements and he drew a distinction between subsequent acts, which he regarded as admissible, and subsequent declarations which were inadmissible. And, admitting evidence of the subsequent acts of the father in this case, he held that they

were sufficient to rebut the presumption of advancement. Romer L.J., on the other hand, had accepted the statement in the textbooks as correctly stating the general rule of law but considered it was one to which there were at least three admitted exceptions. First, that evidence of subsequent acts was admissible if those acts were so associated with the original transaction as to form part of it; secondly, that subsequent acts of either party, if against interest, were admissible as admissions; and, thirdly, if the subsequent acts tended to show a course of dealing between the parties. And he regarded the acts of the father in this case as coming within the first exception.

In the House of Lords Viscount Simonds regarded the law as clear: "... this appeal raises questions in regard to the application of the equitable doctrine of advancement which I had regarded as well settled long ago" (at 968). And he went on to say that it would be "very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) upon the well-settled law on this subject. It is, I think, correctly stated in substantially the same terms in every textbook I have consulted and supported by authority extending over a long period of time" (at 970). The distinction which had been drawn by Denning L.J. is therefore rejected. And though Viscount Simonds was prepared to accept the principle in the first two exceptions adverted to by Romer L.J., he considered that, when properly applied to the present facts, they produced a result opposite to that reached by Romer L.J. Thus, as to the first of those exceptions, he thought the subsequent acts of the father were too remote in time from the original transfer to rank as part of that transaction, and said: "There must often be room for argument whether subsequent events can be regarded as forming part of the original transaction so as to be admissible evidence of intention . . . But though I know of no universal criterion by which a link can for this purpose be established between one event and another, here I see insuperable difficulty in finding any link at all. The time factor alone of nearly five years is almost decisive, but apart from that the (subsequent) events . . . whether taken singly or in their sum, appear to me to be wholly independent of the original transaction" (at 973).

He then considered whether these subsequent events might be admissible under the second exception, namely as admissions by the children against interest. But here he thought it was "an indispensable condition of such conduct being admissible that it should be performed with knowledge of the material facts" (p. 973), whereas in the present case the children did what they were



told to do by their father without inquiry or knowledge and this precluded the admission of their conduct.

But as to the third of Romer L.J.'s exceptions, Viscount Simonds said that if this was intended to introduce a "new category of admissible evidence, *viz.*, acts which, though not part of the same transaction, yet indicate a course of dealing, I must reject it on the ground that it cannot be supported by reason or authority. This form of evidence was expressly rejected by Lord Eldon in *Murless v. Franklin* (1818) 1 Swan. 13, 19, and I am not aware of any attempt having been again made to introduce it" (p. 971).

In the result, therefore, since evidence of the acts of the father in 1934 was inadmissible, there was nothing to rebut the presumption of advancement arising from the original transfer. The real importance of this decision, however, lies not in the particular result which, of course, was based on the special facts in this case, but in the restatement of what the textbooks had regarded as settled law. The admitted exceptions to this general principle are neither so great in number nor so wide in ambit as to disturb the rule itself. At the same time, the application of any one of these exceptions to a set of circumstances sufficiently different from those under review, might well result in the admission of subsequent conduct which would rebut the presumption of advancement.

T. C. THOMAS.

COMPANY LAW—POWERS OF DIRECTORS—SCHEME TO DEFEAT  
TAKE-OVER BID

THE report of an inspector appointed by the Board of Trade under section 165 (b) of the Companies Act, 1948, is not technically a legal source. The result, however, of the investigation conducted by Mr. E. Milner Holland, Q.C., under that section into "The Savoy Hotel, Limited and the Berkeley Hotel Company, Limited" (H.M.S.O. 1951), merits attention. The conclusions reached by the learned inspector are likely to influence particularly the advisers of other boards of directors who face "take-over bids."

The facts in the Savoy case can be summarised as follows. The Berkeley Company owned the Berkeley Hotel. Its memorandum of association gave it power, *inter alia*, to sell let or dispose of that property, and to promote companies which could buy it. The Berkeley Company was a wholly owned subsidiary of the Savoy Company and, with one exception, the composition of their boards of directors was identical. The articles of association of both companies delegated to the directors the conduct of business.

It is now clear law that under such articles the shareholders cannot interfere with the day to day management. But they can, by special resolution, alter the articles, or, by ordinary resolution, dismiss the directors (Companies Act, 1948, s. 184 (1) ), and these powers gave the Savoy shareholders control not only over their own, and the Berkeley, directors, but also, in the last resort, over the use made of the hotel. In December, 1953, this position was fundamentally changed by what the inspector called "the Worcester scheme."

By that date more than one person desired to secure a majority holding in the Savoy Company, in order, it seemed, to change the character of the hotel and put it to a use more immediately profitable. The Worcester scheme was designed to deny to such persons any power to effect that change even if they controlled the Savoy Company. The first step was the formation of a new company, the Worcester Company, of which two of the Savoy board were appointed directors, and to which the Berkeley Company sold the hotel. The price, fixed by valuation, was satisfied by the issue to the Berkeley Company of 323,000 First, and 65,000 Second Preference £1 shares in the Worcester Company, the latter carrying normal voting rights, but the former conferring none, except on proposed alterations of class rights. The Worcester Company granted a fifty year lease of the hotel to the Berkeley Company, under which the lessee covenanted to use the premises as hotel and restaurant and not for any other purpose without the consent of the Worcester Company. Trustees were then appointed of a new Savoy Benevolent Fund set up to assist poor employees and ex-employees. A sum held previously as revenue reserve by the Savoy Company was transferred to the trustees, who, having power to invest in the securities of any British company, promptly bought all but four of the 200,000 one shilling Ordinary shares in the Worcester Company. Since these shares carried the same number of votes, the trustees (the Savoy chairman and two relatively independent persons) now controlled that company, and had replaced the Savoy shareholders as the persons who ultimately controlled the hotel. Those shareholders still controlled the Berkeley Company, but that company had only the lease permitting restricted use of the hotel, and a preference shareholder's rights in the Worcester Company. One of the bidders for the Savoy shares thereupon requested the Board of Trade to appoint an inspector. Soon afterwards the attempt to take over was abandoned and the Worcester Company was wound up.

That, in bare outline, was the situation on which the inspector was asked to report "In particular . . . whether or not in his

opinion the persons concerned with the management of the hotel companies . . . committed any breach of their duty to the hotel companies or the members thereof." It may be thought that an investigation of this sort is not the best way of deciding a difficult question of law—especially when there is "an apparent absence of any judicial decision" directly relevant (Report, p. 26). But it may be that this is the only effective way, as we shall see, for the minority shareholder to challenge the directors, and it would be unfair to him if the investigation were restricted to questions of fact.

The first problem was whether the directors, in putting into effect their scheme, acted "bona fide in the best interests of their companies." A detailed analysis led the inspector to the conclusion that they honestly believed that it was, "on a long term view," in the interests of their companies, their shareholders, and the group as a whole to adopt it. They were not thinking of their own positions, and, although they did take certain extraneous matters into account, such as loss of dollar earnings if the hotel was closed, those were "further reasons" which did not displace their "genuinely held opinion as to the true interests of the companies of which they were directors" (Report, p. 23). Phrases of this sort are scattered throughout the cases on company law. They are rarely explained. At one stage counsel had, it seems, advised the Savoy directors that they must act bona fide in what they believed were the best interests not only of the present, but also of the future, members before they satisfied the test. The inspector does not criticise this unusual formula, but he seems to think that the directors need consult the interests only of present members; albeit on a "long-term view." This, again, is rather different from the thought which Evershed M.R. in *Greenhalgh v. Arderne Cinemas* [1951] Ch. 286, 291, suggested as proper to a member who wished to vote "bona fide for the benefit of the company as a whole" on a change of articles—namely, will this benefit the "individual hypothetical member"? The interests of "the company" are, indeed, hard to define and it is not surprising that the inspector did little more than decide that the directors acted as honest men of business might be expected to act. He did not turn his mind to the further question whether they obtained any benefits for which they should have accounted to their companies. If, for example, the Worcester directors were paid, that remuneration might be thought to be gained by "reason only of" their other directorships (*cf. Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All E.R. 378, 389).

Secondly, the inspector found that neither the court nor a general meeting could interfere with the proper exercise of the directors'



powers in the absence of bad faith (Report, p. 25). (It is submitted that the members can also act if there is deadlock on the board: *Barron v. Potter* [1914] 1 Ch. 895.) In particular, since the Worcester directors had been given the usual power of management, the court would not wind up that company under the so-called "just and equitable" jurisdiction solely because their conduct of affairs prejudiced the interests of the First Preference shareholder. Thirdly, the Worcester scheme was not *ultra vires* the memorandum of the Berkeley Company. Fourthly, the articles delegated to the Berkeley directors power to exercise all the powers of that company and expressly gave them power to dispose of the undertaking. The scheme "fell precisely within the express terms of these provisions" and was, therefore, *intra vires* the directors (Report, pp. 24-5). But there was a further question. The directors acted in order to deprive the members of power to vary their decision about the hotel. Was it possible to declare the scheme invalid because of that? The inspector thought that it was. He cited *Piercy v. Mills & Co.* [1920] 1 Ch. 77 as authority for the proposition that, even if they believe it to be in the best interests of the company, directors cannot exercise their power of issuing unissued shares in order to retain a voting majority. That power was given them in order to raise further capital. In our case, the powers had been given to the directors "for the purpose of managing the business," and to use them for the purpose of "depriving (the) shareholders of such control as under the regulations of the company they may have over the company's assets" amounted to "an invalid use of the powers of management" (Report, p. 27).

Even if this conclusion be correct, the route by which it is reached seems unnecessarily tortuous, for there appears to be little advantage in the suggested distinction between acts done *bona fide* by directors *ultra vires* the articles, and acts, done *bona fide*, *intra vires*, but invalid because of their purpose. Support can, perhaps, be found for this terminology in the judgment of Sargant J. in *Galloway v. Hallé Concerts* [1915] 2 Ch. 233, 240; but it seems unnecessary and might be confusing. The powers of directors must be used for the benefit of the company, for this is a fiduciary relationship; but all further limitations must be found in the articles, and the problem is one of construction. (See *Re Smith and Fawcett* [1942] Ch. 304, and on the use for improper purposes of the power to forfeit shares, *Re Agriculturist Cattle, Stanhope's Case* (1866) 1 Ch. 169; and *Manisty's Case* (1873) 17 S.J. 745.) If the Berkeley directors' powers were, in truth, granted them for the "management of the business" and they used them for something else, they acted *ultra vires* the articles. There is certainly much to

be said for the inspector's construction; but it is interesting that in his opinion a sale of the hotel, simpliciter, would have been a valid use (Report, p. 27)—apparently without reference to its purpose.

If the argument in the report is correct, it becomes profitable to inquire into the position of a bidder who, after acquiring a few shares, learns of some "Worcester scheme." Can he take action in the courts? Cases like *Piercy v. Mills* involved something in the nature of a "fraud on the minority" (or rather on the majority which the directors tried to turn into a minority), and so fell under a clear exception to the rule in *Foss v. Harbottle* (1843) 2 Hare 461, for the directors took benefit for themselves. In our case they were not trying to do that. True it is that they had acted beyond their powers, but not beyond the company's powers. Such acts can be ratified by a bare majority of members (*Grant v. U.K. Switch-back Ry.* (1888) 40 Ch.D. 135) and "it is obvious that . . . (the minority) . . . cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority" (Lord Davey in *Burland v. Earle* [1902] A.C. 83, 93). The unsatisfactory conclusion that a minority cannot sue in the event of a "Worcester scheme" might be avoided if the court took the view that the case were sufficiently tinged with oppression or unfairness for justice to demand a further exception to the rule (see Jessel M.R. in *Russell v. Wakefield Waterworks* (1875) 20 Eq. 474, 480, 482); or if the scheme were thought to deprive each member of a private right to which his position would otherwise entitle him, in which case the rule is irrelevant and he sues to protect himself, not the company (see *Edwards v. Halliwell* [1950] 2 All E.R. 1064; cf. *Quinn & Axtens v. Salmon* [1909] A.C. 442).

The extent to which these two exceptions will be used, however, to reduce the rule in *Foss v. Harbottle* to insignificant proportions is not yet clear, and the bidder bent on control may find a quicker method of securing his ends than legal action. As the inspector remarks in our case (Report, p. 12): "it would have been a difficult decision for (the trustees of the Benevolent Fund) owing a duty only to their trust to have refused an offer" of a high price for the Ordinary shares. The maximum dividend on those shares was 6 per cent. non-cumulative. An offer of cash which could have been invested to produce more might surely have secured control of the Worcester Company. If so, the whole scheme was not merely *ultra vires* the directors, but ineffective against a really resolute bidder.

## LANDLORD AND TENANT ACT, 1954—SECURITY OF TENURE

TENANTS of dwelling-houses to which the Rent Restrictions Acts apply have long enjoyed security of tenure under those Acts. Since 1948 security of tenure has also been available to tenants of agricultural holdings. The Landlord and Tenant Act, 1954, which came into force on October 1, 1954 (s. 70 (2)), has now extended the benefits of security of tenure to two further classes of tenant. Part I of the Act applies to "any long tenancy at a low rent" in respect of which the circumstances are such that on the termination of the tenancy the tenant would, but for the lowness of the rent, be entitled to retain possession of the whole or any part of the property (s. 2). Part II applies to "any tenancy" (except those mentioned in section 43) "where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes" (s. 23 (1)). "Business" includes "a trade, profession or employment" and "any activity carried on by a body of persons whether corporate or unincorporate" (s. 23 (2)); but Part II does not apply if the business is carried on in breach of a general prohibition in the tenancy agreement which relates to the whole of the premises (s. 23 (4)).

The methods whereby security of tenure is ultimately achieved by Parts I and II respectively, when once the original tenancies have been terminated, differ greatly. Part I extends the protection of the existing Rent Acts (s. 1) not only to tenants holding under a long tenancy at a low rent, but also to subtenants whose interests are carved out of such tenancies (s. 15), thereby reversing to that extent the decision of the Court of Appeal in *Knightsbridge Estates Trust v. Deeley* [1950] 2 K.B. 228. Part II enables "business" tenants to claim a new lease from time to time and denies to landlords the right to recover possession except upon grounds set out in section 30. But both Parts provide that the original tenancies to which they respectively apply "shall not come to an end" unless terminated in accordance with Part I or Part II, as the case may be. The original agreements of the parties are to remain in force beyond the period agreed upon by the parties, unless either landlord or tenant has already taken, or until such time as he does take, steps to terminate them. Moreover the steps to be taken for this purpose, which are set out in detail in the relevant section of the Act itself and in the two sets of Landlord and Tenant (Notices) Regulations (S.I. 1107 and 1746 of 1954) made thereunder are similar in many respects.

Lack of space precludes any further consideration of Part I of the



Act. In its application to business tenancies the new Act must be read together with Part I of the Landlord and Tenant Act, 1927. Part II of the new Act repeals the 1927 Act in so far as it provides for compensation for goodwill when a tenancy is not renewed and for the right to a single new tenancy in lieu of compensation for goodwill in certain cases (s. 45), and gives in their place to all business tenants who can claim the benefit of the new Act—a class far wider than that which could claim the benefit of the old—a right to a new tenancy quite irrespective of goodwill. Moreover a tenant's request for a new tenancy may now be made in the course of any "current tenancy," that is to say any tenancy under which the tenant holds for the time being which was originally granted for a term of years exceeding one year or for a term of years certain and thereafter from year to year (s. 26 (1)). Any number of new tenancies may now be claimed by the same tenant or in respect of the same business. With regard to compensation for improvements, however, the Act of 1927, as amended by Part III of the Act of 1954, is still good law; and it still only applies to tenancies of "holdings" defined by section 17 of the Act of 1927.

Business tenancies within the meaning of the new Act—whether original tenancies or new tenancies created by virtue of the Act—may still be brought to an end by surrender or forfeiture or by a tenant's (but not by a landlord's) notice to quit served in accordance with the tenancy agreement (s. 24 (2)). They may also be replaced by a new tenancy agreed upon between the parties (s. 28). Subject to this, such tenancies continue until they are terminated by either landlord or tenant in accordance with sections 25–27. A landlord who wishes to terminate a "current tenancy" must serve a notice to that effect under section 25. A tenant may terminate a "current tenancy" either (a) if he is dissatisfied with its terms, by making a request for a new tenancy under section 26 or (b) if he wishes to give up possession, by serving a notice under section 27. Furthermore a tenancy continued by Part II of the Act does not come to an end automatically by reason of the fact that the premises cease to be used for "business" purposes; but it may then be terminated in accordance with the agreement or by notice given by the landlord (s. 24 (3) (a)). Neither party, however, is at liberty to terminate a "current tenancy" under the Act on a date earlier than the earliest date upon which it would have expired by effluxion of time or could have been brought to an end by notice to quit, if the Act had not been passed (ss. 25 (3) (a), 26 (2)). Save in the event of surrender or forfeiture there can be no shortening of the original term. But

when once a "current tenancy" has been brought to an end, whether by a landlord's notice or by a tenant's request, the tenant may, if necessary, apply to the court (the county court if the rateable value of the property does not exceed £500: s. 63 (2)) for a new tenancy; and if he does so, the "current tenancy" is extended till after the application is finally disposed of (s. 64).

Meticulous compliance with the rules of procedure contained in sections 25 and 26 is essential. Rigid time limits are imposed, designed, it seems, to strike a balance between minimising delay and allowing the parties time to reach agreement without going to the court. In particular both a landlord's notice and a tenant's request must be exactly in the form prescribed by the Lord Chancellor in regulations made under section 66: otherwise they "shall not have effect." But a notice to quit given at a time when the tenancy is not one to which Part II applies and which is not in the prescribed form is not to become invalid by reason of the fact that the tenancy subsequently becomes one to which Part II does apply (s. 24 (3) (b)). This subsection has already been before the courts. It clearly contemplates cases where there has been a change of use between the service of the notice and the date when the notice is intended to take effect. But it does not, in the view of Devlin J., render valid a notice not in the prescribed form, which was served before October 1, 1954, and which purports to terminate a tenancy of the type to which Part II applies on or after that date: *Orman Brothers Ltd. v. Greenbaum* [1954] 1 W.L.R. 1520. It may be thought surprising that an Act of Parliament should affect the validity of notices served before the date upon which the Act is expressed to come into force; but the learned judge was fortified in his view that this was the intention of Parliament by the fact that a device has been adopted in this Act whereby the regulations which prescribe the forms of notice were brought into force before the Act itself (see section 68 and Ninth Schedule and *Orman v. Greenbaum* (*supra*) at p. 1523). At the time when the notice to which this decision relates was served the Regulations had in fact been brought into force; the reasoning, however, would appear to extend to notices served before any form of notice had been prescribed and even before the passing of the Act.

If a tenant applies for a new tenancy, the court must, in general, make an order accordingly (section 29 (1)), thereby giving the tenant security of tenure. But it has no power to do so (a) if the landlord establishes any of the seven grounds of opposition set out in section 30 (1) or (b) if section 31 (2) applies. The

grounds of opposition may be classified into three main groups. First, a tenant will not be protected if he has shown himself to be an unsatisfactory tenant, to whom the grant of a new tenancy ought not to be made (s. 30 (1) (a) (b) (c)). Minor lapses, it seems, are to be overlooked in these cases. Secondly, no order will be made if the landlord has offered and is still willing to provide or secure the provision of alternative accommodation which is reasonably suitable in all respects to the tenant's needs (s. 30 (1) (d)). It is not sufficient that alternative accommodation should merely be available. Thirdly, there are cases where the landlord's personal interests are to be allowed to prevail (s. 30 (1) (e) (f) (g)). But in these last three cases the tenant must be paid compensation for disturbance in accordance with section 37, subject to a limited right of the parties to contract out of paying compensation (ss. 38 (2) (3)). If any of these grounds are established the court, save in one exceptional case (s. 30 (2) ) " shall not make the order " (s. 31 (1)), although in the majority of cases the relevant paragraphs are so worded that the court is not without discretion in deciding whether a landlord has made out his case. But under section 31 (2), if the landlord offers a new tenancy on any of the grounds contained in paragraphs (d) (e) or (f) of section 30 (1), and the court is of opinion that the landlord would have succeeded if the date of termination of the current tenancy had been later, but not more than a year later, the court must, instead of ordering a new tenancy, make a declaration accordingly; and the tenant may then, if he wishes to do so, have the current tenancy prolonged till the date named in the declaration.

A new tenancy ordered by the court will be upon such terms, in default of agreement between the parties, as the court thinks fit (ss. 33 to 35), save that the term must not exceed fourteen years and the rent must be calculated in accordance with section 34. The order binds the landlord in any event (s. 36 (1)). The tenant, however, if dissatisfied with the terms of the tenancy may still have the order revoked—at his peril as to costs (s. 36 (2) (3)). But the whole of the property comprised in the current tenancy will not necessarily be included in the new tenancy. Security of tenure under this Act, unless the landlord otherwise requires, is to be confined to the " holding " (s. 32); that is to say, any part of the original property which is occupied neither by the tenant nor by a person employed by him and so employed for the purposes of the " business " which brings the property within Part II will be excluded (s. 23 (3)).

Certain tenancies which might otherwise fall within the definition of business tenancies are excluded from Part II (s. 43). In



particular a tenant cannot claim the protection of Part II of the Act of 1954, if he is already protected by either the Rent Acts or the Agricultural Holdings Act, 1948. Difficulties will no doubt arise in cases where premises are used for both residential and business purposes, if it is not clear whether they have been let as a separate dwelling or not; and it may even be doubtful sometimes, as in *Monson v. Bound* [1954] 1 W.L.R. 1321, whether a property is let as business premises or an agricultural holding. And even business premises are outside Part II if granted for a term certain not exceeding three months (s. 43 (1)); but the same subsection contains stringent safeguards against any evasion of the policy of the Act by this means.

Lack of space again precludes more than a bare reference to the special situations which arise when a tenancy is held on trust (s. 41) or by associated companies (s. 42); or to the fact that Part II binds the Crown subject to certain qualifications (s. 56 to 60). But a word should perhaps be said about the definition of "landlord" in section 44. Subject to section 44 (2) the "landlord" (the "competent landlord") for the purposes of Part II is not necessarily the immediate landlord. He is the owner of that interest in the property which is (a) in reversion expectant on the relevant tenancy and (b) is either the fee simple or a tenancy which will not come to an end within fourteen months either by effluxion of time or by notice to quit already given by the landlord, and which is not itself in reversion upon an interest which fulfils those conditions. In other words a sub-landlord is not a "competent landlord" unless his reversion, whether immediate or not, is an interest which will outlast the relevant tenancy by at least fourteen months: and if more than one reversion fulfils this condition, it is the shortest which counts. The relationships between the competent landlord on the one hand and superior and mesne landlords on the other, when the competent landlord takes action under the Act, are governed by the Sixth Schedule.

D. MACINTYRE.

## LICENCES, A JONAH'S GOURD

(continued) †

H. G. HANBURY \*

### *Licence or lease?*

As formerly a party, who might now find a remedy as a licensee, was left without a remedy because the only resource then known to his counsel was to force the admission of his right into the category of easements,<sup>1</sup> so now, in the light of our present knowledge, a person may, as in *Errington v. Errington*,<sup>2</sup> achieve in the character of licensee an object which eluded him as long as he took steps in the wrong direction by asserting an abortive title as lessee. The question, whether an interest is a licence or a lease, is most important, and without some examination of the older cases the modern cases cannot be understood. The oldest case appears to be *Hall v. Seabright*.<sup>3</sup> X sued Y for trespass to his house; Y pleaded that X gave him a licence to occupy until midsummer if he so wished. But the court seems to have been of opinion that the defendant must have had a lease or nothing, and there is no such thing as a lease whose existence depends on the will of one party. Professor Hargreaves cites this case as authority for the familiar proposition, recited at the beginning of this article, that "parties cannot by their mere intention vary the legal consequences of their own acts." The moral would seem to be that even an abortive lease cannot be interpreted as a licence.<sup>4</sup> He maintains that it was not until *Errington v. Errington*<sup>5</sup> that a person admittedly in exclusive possession of land was denied a legal or equitable title to the land itself, and relegated to the position of licensee, which was elevated for his protection to give him advantages as good as those he would have enjoyed had such a title been attributed to him. Denning L.J. in that case, which must later be more fully discussed, paid considerable attention to *Howard v. Shaw*,<sup>6</sup> but, as Professor Hargreaves urges, unnecessarily,<sup>7</sup> for it decides only

† First part [1954] C.L.J. 201-14.

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<sup>1</sup> *Hill v. Tupper* (1863) 2 H. & C. 121, ante, [1954] C.L.J. 201, 203.

<sup>2</sup> [1952] 1 K.B. 290.

<sup>3</sup> (1669) 2 Keb. 561.

<sup>4</sup> 69 L.Q.R. 466, 470.

<sup>5</sup> [1952] 1 K.B. 290.

<sup>6</sup> (1841) 8 M. & W. 118.

<sup>7</sup> 69 L.Q.R. 466.

that a party in possession of land under an abortive contract of sale must pay a reasonable sum by way of compensation to the owner in respect of his occupation as from the time at which the contract failed.<sup>8</sup> Lord Abinger said that he was in the position of tenant at will, but the same result would have been reached had he been treated as a licensee.

Of the cases which yet invite consideration, some are concerned with the peculiar rights of a deserted wife as regards the matrimonial home, others with the obligations incumbent on a third party to respect the rights of a licensee. But before we come to these, we must glance at cases where it is simply one of the original parties to an arrangement which may fall to be interpreted as a lease or a licence who seeks to eject the other, and these are, for the most part, grouped round the Statutes of Limitation and the Rent Acts. *Doe d. Groves v. Groves*<sup>9</sup> is actually a case which involves the rights of a mortgagee. V, seised in fee of Dale, died in 1793, leaving a widow W, and a son X, a minor. W, with whom X lived, continued in occupation. In 1798, X being still a minor, W married Y, who took up residence with W and X. In 1805 X left home, but returned to pay occasional visits. In 1841 W died. In 1842 Y mortgaged Dale to Z, for money which was paid to X, Y being present at the execution of the mortgage deed and receiving the money directly from the hand of X. It was held that Z could eject Y, who, by reason of X's periodical visits, could not resist the inference that he was merely tenant at will to X. Y could not have asserted a parliamentary title against X, nor could he do so against Z. In *Locke v. Matthews*<sup>10</sup> X, in 1830, enclosed about six acres of waste land and built a cottage thereon. He remained in possession without any acknowledgment or payment of rent until 1845, when the steward of the owner served him with a notice in ejectment. A compromise was effected, X consenting to give up four acres, on being allowed to continue in possession of the cottage and the other two acres until his death, which occurred in 1861. It was held that the transaction of 1845 amounted to an actual entry, and operated as a determination of the original tenancy at will and the creation of a new tenancy; therefore the period of limitation must be reckoned from 1845, and not from 1830. In neither of these cases was there any suggestion that the relation should be interpreted as that of licensor and licensee, but the possibility of inferring that relation has proved a

<sup>8</sup> Had it been completed, the purchaser would have had an equitable estate in the land, which, since 1925, would have been registrable as an estate contract.

<sup>9</sup> (1847) 10 Q.B. 486.

<sup>10</sup> (1863) 13 C.B.(n.s.) 753.



valuable safeguard to prevent the injustice of the loss of an estate by one who has befriended an ungrateful friend. This is well illustrated by the Irish case of *Peakin v. Peakin*.<sup>11</sup> X allowed Y and Z, his sisters, to live in his house, and contributed to their support. He paid the rent and taxes,<sup>12</sup> and executed all necessary repairs. Yet Y and Z had the assurance to invoke the Statute of Limitation against him. But this iniquitous result was happily avoided. Andrews J. held that their position was simply that of guests—he did not use the term “licensees,” but “guests” for this purpose is synonymous—not of tenants at will. He put it that Y and Z never had *independent* possession; X could at any time have sustained an action of trespass *quare clausum fregit* against them, by virtue of his *actual* possession.

The vital significance of the distinction between a licence and a lease is, of course, that the interest of a licensee is not adverse to that of his licensor, as is that of a lessee to that of his lessor. The old doctrine of adverse possession had been, in a sense, abolished by the Real Property Limitation Act, 1833; or, as it would perhaps be truer to say, the Act got rid of the rules which formerly prevented the possession from being adverse.<sup>13</sup> In particular, the cumulative effect of sections 3 (4), 7 and 8 was to enable the tenant of a term of any length to gain a title against his landlord by holding over after his tenancy had expired. Lord Denman, in *Nepean v. Doe d. Knight*,<sup>14</sup> put it that the question now simply was, whether twenty years<sup>15</sup> had elapsed since the right accrued. So in *Lynes v. Snaith*<sup>16</sup> it was held that the running of time in favour of a tenant at will who paid no rent was not interrupted by the periodical entry of the landlord, without objection by the tenant, to do repairs. Channell J. thought it worth while to remark that such a possession might not, before 1833, have been adverse. But the breadth of the statements of Lord Denman and Channell J. needs qualification. For what the Act really did was to clear away unnecessary artificialities; it was never intended to enable one person to invoke

<sup>11</sup> [1895] 2 Ir.R. 359. The court distinguished *Doe d. Dayman v. Moore* (1846) 9 Q.B. 555, where an actual tenancy was found to exist. W let a house to X, his daughter, and Y, her husband, and then devised it to X for life, with remainder to Z. X and Y occupied for 43 years, when X died, and Z sought to eject Y, attributing X's possession simply to the devise and to the receipt of an annuity charged on other land. But it was held that X and Y had completed a parliamentary title 21 years (20 + 1 year) after the beginning of their *tenancy at will*.

<sup>12</sup> The report is silent as regards rates.

<sup>13</sup> Lightwood, *Possession of Land*, 181.

<sup>14</sup> (1837) 2 M. & W. 911; see also Darby and Bosanquet, *Limitation of Actions*, 275.

<sup>15</sup> Reduced to 12 years by the Real Property Limitation Act, 1874.

<sup>16</sup> [1899] 1 Q.B. 486.

its advantages so as to flout an obligation containing a fiduciary element or exploit a situation which must be regarded as incompatible with a claim of title. In order to prevent a servant or agent from making an unscrupulous use of the Act,<sup>17</sup> it was necessary, as both Holdsworth and Lightwood point out, to build up, to a certain extent, a new doctrine of adverse possession,<sup>18</sup> which may be taken to cover the case of licensees.

It is convenient at this point at last to turn to the fuller discussion of *Errington v. Errington*,<sup>19</sup> where Denning L.J. criticised the standpoint taken up in *Lynes v. Snaith*,<sup>20</sup> that in deciding the question "lease or licence," the sole criterion is to be found in the presence or absence of exclusive possession on the part of the occupier. His rejection of this test is in turn criticised by Professor Hargreaves as a creation of new law.<sup>21</sup> A father intended to provide a house for his son who was about to be married. He partly paid for it, partly left the price on mortgage. He arranged with the couple that they were to occupy as long as they kept up the payments of the instalments due to the mortgagee building society; eventually, after the whole sum had been paid off, he would convey the house to them. The payments were duly kept up by the couple until the death of the father, but the son then left his wife and went to live with his mother, to whom the father had devised the house. The son's wife nevertheless continued to keep up the payments, until sued by her mother-in-law for possession. We are necessarily anticipating points which yet remain for consideration, as the daughter-in-law was a deserted wife and the mother-in-law a third party. Here, however, we can determine the status of the occupiers. Were they tenants at a rent, notwithstanding that the rent was payable, not to the owner of the house, but to the mortgagee? No, because they were in no sense bound to pay it; they could not be sued by anyone for non-payment. Were they tenants at will without rent? This was the status attributed to them by the county court judge; it would follow from it that the mother-in-law would have lost her title by lapse of time. But the Court of Appeal refused to regard them in this light, on the ground that, as Denning L.J. put it, "it is of the essence of a tenancy at will that it should be determinable by either party on demand."<sup>22</sup> Were they licensees? Yes, but with a contractual right, under

<sup>17</sup> See *Allen v. England* (1862) 3 F. & F. 49.

<sup>18</sup> Holdsworth, *History of English Law*, Vol. VII, 78-80; Lightwood, *op. cit.*, 181 *et seq.*

<sup>19</sup> [1952] 1 K.B. 290.

<sup>20</sup> [1899] 1 Q.B. 486.

<sup>21</sup> 69 L.Q.R. 466, 481.

<sup>22</sup> [1952] 1 K.B. 290, 296.

*Winter Garden Theatre v. Millennium Productions*,<sup>23</sup> to remain as long as provided by the terms of the licence, that is to say, until non-payment of one of the instalments.

Professor Hargreaves argues, in effect, that the right result was reached by the wrong path. The right path would have led the Court of Appeal to the gates of equity, whose relief against the requirements of legal formalities should have been invoked, as in *Bannister v. Bannister*,<sup>24</sup> to establish the interest of the defendant as "a determinable life estate, with an ultimate limitation in fee on payment in full of the mortgage instalments." His epitaph on the case is, in effect, "*facilis descensus Averno*." The inevitable aftermath was *Cobb v. Lane*,<sup>25</sup> where a sister had allowed her brother to occupy her house for thirteen years rent-free, she paying the rates. It was held that her executors could recover the house, on the ground that the brother was a licensee, never having enjoyed such possession as would set time running under the Act of 1833. Professor Hargreaves argues that the effect of the decision is practically to repeal section 7 of that Act,<sup>26</sup> but it is submitted that he overlooks the establishment of a new doctrine of adverse possession since its passage,<sup>27</sup> and also *Peakin v. Peakin*,<sup>28</sup> which is distinguishable only in that it is an Irish case. On the other hand, it is interesting to compare the unreported case of *Gorham v. Field* (1952), here cited by Denning L.J., with another unreported case cited by Channell J. in *Lynes v. Snaith*.<sup>29</sup> In both cases a servant was allowed to occupy his employer's house, but in the earlier case he was taken to be a tenant at will, in the later a licensee.

Let us now turn to the cases involving the Rent Acts, remembering, as we examine them, that landlords will exert every ingenuity to avoid their oppressive effect. The automatic crystallisation of a tenant's status is doing much to dry up a landlord's springs of kindness. In *Foster v. Robinson*<sup>30</sup> X let a cottage to Y, a farm labourer, at a small rent. X then let the farm itself, but told Y, when he became unfit for work, that he could stay on for life rent-free. Y died, and Z, his daughter, claimed the same rights as Y. It was held that X could recover the cottage from Z notwithstanding that its tenancy had been covered by the Rent Acts. The view taken by Evershed M.R. was that Y's contractual tenancy had been superseded by a licence to occupy for life, the contractual element

<sup>23</sup> [1948] A.C. 173.

<sup>24</sup> [1948] 2 All E.R. 133; *ante*, [1954] C.L.J. 201, 210.

<sup>25</sup> [1952] 1 All E.R. 1199.

<sup>26</sup> 69 L.Q.R. 466, 482.

<sup>27</sup> *Ante*, n. 18.

<sup>28</sup> [1895] 2 Ir.R. 359.

<sup>29</sup> [1899] 1 Q.B. 486, 490.

<sup>30</sup> [1951] 1 K.B. 149.



in which carried with it the negation at once of any power to eject Y, and of any power of posthumous transmission by Y to Z. In *Marcroft Wagons v. Smith*<sup>31</sup> the Court of Appeal appears to orientate into a definitive theory the conclusion to which it was pointing in *Foster v. Robinson*,<sup>32</sup> that it will not be astute to construe an arrangement as a lease rather than as a licence; even the acceptance of periodical payments will not postulate this construction. X was the statutory tenant of W; the tenancy devolved on Y, his widow, under section 12 (1) (g) of the Rent Act, 1920, the effect of which was, of course, exhausted at Y's death. W refused a request from Z, the daughter of X and Y, for the transfer of the tenancy to her, but allowed her to occupy for the time, paying the same rent as Y had paid. It was held that out of this transaction nothing more could be inferred than a humane willingness to allow the state of affairs at Y's death to continue for a further unspecified period, and so W could recover the house from Z, a mere licensee.

### *The Marital Cases*

A prominent feature of the work of the courts in recent years has been the determination of the right of a deserted wife to continue in occupation of the matrimonial home.<sup>33</sup> The conclusion has been that she holds under an implied licence from the husband which, normally, he cannot revoke.<sup>34</sup> Professor Hargreaves has no quarrel with these decisions, on the ground that one who has admittedly no estate in the land either at law or in equity must necessarily be driven to rely on the position of licensee, which should not have been accorded to the defendant in *Errington v. Errington*,<sup>35</sup> who enjoyed exclusive possession of the house. Let it be said at once that the duration of the licence is co-extensive with the preservation of the marital status, and cannot survive its determination by divorce. So in *Vaughan v. Vaughan*<sup>36</sup> an ex-husband was held entitled to eject his former wife who had divorced him, subject, as in

<sup>31</sup> [1951] 2 K.B. 496.

<sup>32</sup> [1951] 1 K.B. 149. The same conclusion, that a lease had been superseded by a licence, was reached in *Murray Bull and Co. v. Murray* [1953] 1 Q.B. 211, where a director, tenant under a service agreement of his employer's house, held over after the termination of the lease.

<sup>33</sup> See articles by Mr. R. E. Megarry in 67 L.Q.R. 505 and 68 L.Q.R. 379, the latter of which shows that many problems may arise which must catch the courts unprepared, and that the whole of the law on the subject is in an uncertain and unsatisfactory state, especially where the rights and obligations of third parties are involved.

<sup>34</sup> The husband cannot impose on her conditions which purport to qualify it, for there is no consideration for her acceptance of them: *Street v. Denham* [1954] 1 W.L.R. 624.

<sup>35</sup> [1952] 1 K.B. 290; see 69 L.Q.R. 466.

<sup>36</sup> [1953] 1 Q.B. 762. The wife may lose her licence by the acceptance of alternative accommodation, provided that she is assured as to her beneficial ownership of it: *Street v. Denham* [1954] 1 W.L.R. 624.

all licences, to the allowance of a reasonable period for removal as computed in *Winter Garden Theatre v. Millennium Productions*,<sup>37</sup> in this particular case six months. But where the parties are still married, the husband is handicapped by the rule that he cannot sue his wife in tort.<sup>38</sup> He must have recourse to section 17 of the Married Women's Property Act, 1882, which gives a very wide jurisdiction to a judge, allowing him to make such order with regard to the property in dispute as he thinks fit. Its width is in no way constrained by the fact that there has been a decree for judicial separation.<sup>39</sup> But it has been laid down, as a general guide, that it should be sparingly exercised, and, in particular, that the court should be slow to make any order which might have the effect of depriving either spouse of the right to enter the matrimonial home.<sup>40</sup> *Lee v. Lee*<sup>41</sup> is interesting in that the effect of that part of the order, which restrained the husband from assigning any interest in the property until he had provided the wife with other suitable accommodation, would be to prevent him, by anticipation, from selling to a bona fide purchaser for value,<sup>42</sup> in the sense that he could not do so without committing a contempt of court. Somervell L.J. suggested that the order was made in this particular form in an attempt to evade *Thompson v. Earthy*,<sup>43</sup> to which some attention must be devoted under the next heading.

### *The rights and liabilities of third parties*

It is a self-evident proposition that when a licence, express or implied, has come to an end, so that the licensor is no longer

<sup>37</sup> [1948] A.C. 173; see [1954] C.L.J. 201, 214.

<sup>38</sup> Salmond on *Torts*, 11th ed., 77. Goddard L.J. expressed a strong opinion that this rule must preclude him from bringing any action against her for the recovery of land, in the unsatisfactory case of *Bramwell v. Bramwell* [1942] 1 K.B. 370, which appears to stand alone in allowing a husband to eject a wife without recourse to s. 17 of the Married Women's Property Act, 1882. Mr. Megarry (68 L.Q.R. 379) cites *Doe d. Merigan v. Daly* (1846) 8 Q.B. 934, but that decision, which he rightly calls "cynical," turns entirely on the old procedure in ejectment; the husband was allowed to do, as lessor of the plaintiff, what he could not do in his own character. Goddard L.J.'s doubts in *Bramwell v. Bramwell* are amply justified by *Pargiter v. Pargiter* [1946] 1 All E.R. 570; the husband had left the wife and children in the house; his evidence showed that he made her a weekly allowance to look after the children; so the court must consider whether the arrangement was a bare licence or coupled with a condition, and whether it had been validly revoked; the husband failed, but could still proceed under s. 17.

<sup>39</sup> *Hutchinson v. Hutchinson* [1947] 2 All E.R. 792.

<sup>40</sup> *Stewart v. Stewart* [1948] 1 K.B. 507; the Court of Appeal would not interfere with the order of the county court judge, though it might result in the ejectment of the wife while divorce proceedings were pending, and though it did not provide for the husband assuring her alternative accommodation. Since the hearing in the county court, the husband had actually secured his divorce; so the questions had become largely academic. See Hanbury, *op. cit.* 629.

<sup>41</sup> [1952] 2 Q.B. 489.

<sup>42</sup> See *per* Denning L.J. at p. 492.

<sup>43</sup> [1951] 2 K.B. 596.

bound, still less can any restriction affect the activities of a third party. The logical complement to *Vaughan v. Vaughan*<sup>44</sup> is *Robson v. Headland*,<sup>45</sup> which laid down that a wife who has divorced her husband can no longer claim to be covered by his statutory protection under the Rent Act<sup>46</sup>; she can, therefore, be ejected by the landlord.

But, given the existence of the licence, how far can assignees from the licensor be bound by it? Salmond summed the position up thus—

“at law it is a mere agreement, which binds no one save the grantor himself. Such an agreement, however, if of such a nature as to be specifically enforceable, amounts to a good equitable servitude—that is to say, it binds and runs with the land in equity so as to be enforceable not merely against the grantor, but also against all subsequent owners and occupiers of the land except purchasers for value without notice of any such equitable right.”<sup>47</sup>

But it is submitted that this is a dangerous over-simplification. For the first sentence no authority is cited, though *Hill v. Tupper*,<sup>48</sup> at that time at any rate a powerful authority, is discussed on his next page. Another decision which might have been cited in its support is *Coleman v. Foster*,<sup>49</sup> in which it was laid down that a licence is necessarily determined by the assignment of its subject-matter. On the other hand, in *Crosby v. Wadsworth*<sup>50</sup> a common law court was, as we have seen, prepared to protect a grantee against third parties, though it is possible that they must be taken to have regarded his right as one of property. Equity, too, has not shown so great a consistency as Salmond's second sentence would lead us to suppose. True it is that, to a certain extent, *Moreland v. Richardson*,<sup>51</sup> which is cited by him, did for licences in equity what *Tulk v. Moxhay*<sup>52</sup> had done for restrictive covenants, but there are two decisions of the former half of the present century, one of which is of the House of Lords, which leave a

<sup>44</sup> [1953] 1 Q.B. 762; *ante*, [1954] C.L.J. 201, 203.

<sup>45</sup> (1948) 64 T.L.R. 596.

<sup>46</sup> As to the extension of this protection to her during the subsistence of the marriage, see s. 12 (1) (g), and *Marcroft Wagons v. Smith* [1951] 2 K.B. 496.

<sup>47</sup> *Torts*, 11th ed., 281. The second sentence is approved by Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466, 481.

<sup>48</sup> (1863) 2 H. & C. 121.

<sup>49</sup> (1856) 1 H. & N. 37. By a lease not under seal, W and X, trustees for themselves and other owners of a theatre, let it to Y for three years, reserving to themselves and the other owners free liberty of admission to the theatre. It was held that the agreement did not bind Z, lessee from Y for two nights.

<sup>50</sup> (1805) 6 East 602; *ante*, [1954] C.L.J. 201, 205.

<sup>51</sup> (1856) 25 L.J.Ch. 883; (1856) 22 Beav. 596; (1857) 24 Beav. 33.

<sup>52</sup> (1848) 2 Ph. 774.



licensee defenceless, in equity no less than in law, against an assignee from his licensor. On these Mr. H. W. R. Wade, in his powerful attack on the modern decisions which tend to elevate a licence into a new equitable estate in land,<sup>53</sup> naturally lays much stress. In *King v. Allen*<sup>54</sup> it was held that an agreement between "licensors" and "licensees" for fixing advertisements on a wall not yet built, creates not an interest in land, but a mere personal obligation, which the licensees cannot enforce against assignees of the licensors, being confined to their action for damages against the licensors themselves. Lord Buckmaster, in the beginning of his speech, said that he attached no importance to the use of particular words as such, and Denning L.J. in *Bendall v. McWhirter*<sup>55</sup> seized on this statement so as to conclude that the agreement did not create a true licence, the wall being uncompleted, but only a contractual right, of which there had been no assignment. But Lord Buckmaster did, later, mention as significant the fact that the word used was "licence" and not "lease," and not without its significance, too, is the fact that the Irish court, whose decision the House of Lords affirmed, had approved *Hurst v. Picture Theatres*.<sup>56</sup> If it had been expressly approved by the House of Lords also, the case might have proved an insurmountable obstacle to the Court of Appeal in *Errington v. Errington*,<sup>57</sup> for it would have been faced with an authority which could hardly be interpreted in any other way than as confining to the licensor himself the obligation to respect a licence admittedly irrevocable. As the speeches in the House stand, they do leave the door sufficiently ajar for the entry of the new doctrine. The other case, a decision of the Court of Appeal, is *Clore v. Theatrical Properties*.<sup>58</sup> Here the "lessor" purported to "demise and grant" to the "lessee" the use of the refreshment rooms of a theatre, for the accommodation of patrons. The terms "lessor" and "lessee" were to include executors, administrators and assigns. It was held that the assignee of the "lessee" had no rights which could be enforced against the assignee of the "lessor." But there is not sufficient clarity in the court's classification of the indenture. It was indeed clear that it did not create a lease, for it gave no rights in the theatre itself. But the Lords Justices do not seem equally assured as to what it did create. They appear

<sup>53</sup> 68 L.Q.R. 337.

<sup>54</sup> [1916] 2 A.C. 54.

<sup>55</sup> [1952] 2 Q.B. 466, 482.

<sup>56</sup> [1915] 2 I.R. 213; Dixon J. pointed out in *Cowell v. Rosehill Race Course Co.* (1937) 56 C.L.R. 605, 637, that the approval was only in the Irish court.

<sup>57</sup> [1952] 1 K.B. 290.

<sup>58</sup> [1936] 3 All E.R. 483.

to oscillate between a personal contract, a restrictive covenant, and a licence. Both parties were assignees of the original parties to the indenture. If it created merely a personal contract, the decision is plainly correct in that equity will not allow a third-party beneficiary of a contract to enforce it unless he can show that the contractee made the agreement as trustee for him. If it created a restrictive covenant, the assignee of the "lessor" might have been compelled to respect it by extending in favour of the assignee of the "lessee" the principle of *Lord Strathcona S.S. Co. v. Dominion Coal Co.*,<sup>59</sup> unless that case can be isolated, as Lord Wright would isolate it, by confining it to the case of charterparties, or rested, as Romer L.J. would rest it, on the doctrine of constructive trusts. If it created a licence, the decision may now require reconsideration in the light of *Winter Garden Theatre v. Millennium Productions*,<sup>60</sup> which has elevated the right of the licensee into an equitable interest which can, like all equitable interests, be enforced not only against the licensor, but also against all assignees from him, other than a bona fide purchaser for value.<sup>61</sup> A third case which causes some difficulty is *Booker v. Palmer*,<sup>62</sup> though the conclusion actually reached followed inevitably from the hypothesis, which must now probably be regarded as erroneous, of Lord Greene, that the licence was revocable at the will of the licensor. In 1940, W had her house destroyed by a bomb. On her behalf X approached Y, who had two cottages vacant. Y offered to allow W to go into one of them rent-free for the duration of the war. The County Agricultural Committee prescribed that certain fields belonging to Y should be cultivated; in order to comply, Y gave Z a lease of 120 acres of land. The two cottages were comprised in the lease, which, however, contained a provision that Y should be under no obligation to give vacant possession of them. Then Z, requiring the cottage occupied by W for a labourer, demanded possession. It was held that X was not a tenant of Y,<sup>63</sup> but that W was Y's licensee, and Z succeeded to Y's right to revoke the licence at any time. It is submitted that Lord Greene concentrated too much on the familiar rule that the court will not infer the creation of a legal relationship which the

<sup>59</sup> [1926] A.C. 108.

<sup>60</sup> [1948] A.C. 173.

<sup>61</sup> See *per Denning L.J.* in *Bendall v. McWhirter* [1952] 2 Q.B. 466, 482; Professor Glanville Williams in *Can.B.R.* (1952) 1004, 1008.

<sup>62</sup> [1942] 2 All E.R. 674.

<sup>63</sup> It was decided two years later in *Lace v. Chantler* [1944] K.B. 368, that a lease for the duration of the war, being an uncertain period, was void; to counteract this decision the Validation of War-Time Leases Act, 1944, was passed; see also *Hanbury* in 66 L.Q.R. 318, 337.

conduct of the parties negatives an intention to create, and assumed too lightly the revocable character of the licence. Certainly his dictum that the appointment of a set term for its duration does not preclude its abrupt revocation is too wide. The decision may be correct on the footing that X was a mere guest, as in *Peakin v. Peakin*.<sup>64</sup>

In *Thompson v. Earthy*<sup>65</sup> Roxburgh J. refused to protect a deserted wife in her possession of the matrimonial home against a purchaser from her husband. The learned judge makes it quite clear that he regarded the wife's rights as enforceable only against the husband, and not in the light of an equitable interest which could prevail against the title of a purchaser from him; the question whether this purchaser knew of her right or not was therefore irrelevant.

Denning L.J., in a lecture at University College, London, used this case as an illustration of his theme, "the need for a new equity,"<sup>66</sup> and this new equity he and his colleagues of the Court of Appeal were able to apply in *Errington v. Errington*,<sup>67</sup> by upholding the rights of a licensee under a licence, irrevocable so long as she paid instalments due on a mortgage, against the claims of the licensor's devisee, a volunteer. *Thompson v. Earthy*<sup>68</sup> must now be regarded as no longer law, unless on the footing that the purchaser was without notice.<sup>69</sup> The new doctrine was applied to safeguard the tenure of the matrimonial home by a deserted wife, in *Bendall v. McWhirter*<sup>70</sup> against the husband's trustee in bankruptcy, in *Ferris v. Weaven*<sup>71</sup> against a nominal and collusive purchaser with notice.

As against the landlord of a rent-controlled house, a deserted wife is protected against the husband's landlord, as we have seen, by section 12 (1) (g) of the Act.<sup>72</sup> But the extent of her right may

<sup>64</sup> [1895] 2 Ir.R. 359; Hargreaves in 69 L.Q.R. 466.

<sup>65</sup> [1951] 2 K.B. 596.

<sup>66</sup> *Current Legal Problems*, Vol. 5, p. 4.

<sup>67</sup> [1952] 1 K.B. 290.

<sup>68</sup> [1951] 2 K.B. 596.

<sup>69</sup> This would appear to be the view of Lynskey J. in *Street v. Denham* [1954] 1 W.L.R. 624, who said that he would have liked to follow it, had he not been precluded from doing so by contrary and binding authority.

<sup>70</sup> [1952] 2 Q.B. 466. Megarry (68 L.Q.R. 379, 381) argues that the Court of Appeal could not protect the right of a deserted wife against a third party consistently with its own decision in *Taylor v. McHale* (1948), but citation of the *Estates Gazette*, where alone it was reported, was deprecated by the Court of Appeal in *Birtwistle v. Tweedale* [1954] 1 W.L.R. 190, on the ground that those reports are not by a barrister. But see Megarry's spirited rejoinder (70 L.Q.R. 246, 247).

<sup>71</sup> [1952] 2 All E.R. 233.

<sup>72</sup> *Ante*, note 46.



give rise to difficulties. In *Brown v. Draper*<sup>73</sup> it was laid down that the husband cannot aid the landlord by declaring that he has no interest in the house. It was assumed that the wife's right lasts only so long as she stays, but does this mean that she must never go out of doors? In *Old Gate Estates v. Alexander*<sup>74</sup> the husband left his wife and furniture in the flat. He wrote to the landlord that he had given up possession, and was enclosing the key. He did more, for he enacted the part of an amateur lawyer by sending to him a document in which he purported to revoke her authority to remain. It was held that the Rent Act prevented the landlord from evicting the wife. But the case leaves unanswered the question, what her rights would have been, had the husband *effectively* given up possession. Bucknill L.J. doubted whether the wife's licence could be terminated at all, so long as she remained innocent. Somervell L.J. posed the question—what if the furniture had been cleared, and the wife had insisted on continuing to occupy the flat unfurnished? Denning L.J. stressed the special nature of the position of the wife as regards the matrimonial home; the husband, as statutory tenant, retains the protection of the Rent Act even against his will, on behalf of the wife he leaves behind. The husband here was, in effect, relying on the principles of *traditio brevi manu*,<sup>75</sup> in Roman law advanced in order to establish a title, in support of an attempt to evade an obligation.

How far is the wife's right inchoate? Has the law always an eye to a prospective desertion? These questions have received a decisive answer in two recent cases. In *Lloyds Bank v. Oliver's Trustee*<sup>76</sup> it was held that a legal mortgagee was entitled to possession of a house as against the wife of the mortgagor, who had deserted her after the date of the mortgage. The same principle was applied in *Barclays Bank v. Bird*<sup>77</sup> in favour of an equitable

<sup>73</sup> [1944] K.B. 309. The husband could not here be dispossessed, for he was not made a party to the action, which was against the wife for trespass. Lord Greene suggested that all the landlord need now do was to bring a fresh action against the husband, but this was only a dictum, and surely wrong, as it would stultify the statutory protection of the wife.

<sup>74</sup> [1950] 1 K.B. 311. Cf. *Middleton v. Baldock* [1950] 1 K.B. 657. The head-note says that it distinguishes *Old Gate Estates v. Alexander* [1950] 1 K.B. 311; really it follows it, but relegates to dicta the remarks of Lord Greene in *Brown v. Draper* [1944] K.B. 309, 315; see *ante*, n. 73. The husband was acting in collusion with the landlord so as to get rid of the wife; Jenkins L.J. said (at p. 670), "The tenant cannot waive the statutory protection by agreement."

<sup>75</sup> See Inst. 2. 1, 44.

<sup>76</sup> [1953] 1 W.L.R. 1460. Upjohn J. (at p. 1465) put it that *Bendall v. McWhirter* [1952] 2 Q.B. 466, does not give the wife an "irrevocable licence which attaches at the moment of entering into the matrimonial home."

<sup>77</sup> [1954] 1 W.L.R. 321. Professor Glanville Williams (Can.B.R. (1952) 1004, 1014) foresaw that difficult questions might arise as to priorities; the question in these cases was solved on the familiar principle of *qui prior est tempore potior est jure*.

mortgagee. Harman J. made an order for possession within twenty-eight days, refusing to grant to the wife as against the mortgagee the "reasonable period" for removal to which, on the authority of *Vaughan v. Vaughan*,<sup>78</sup> she would have been entitled had the ejector been an ex-husband.

The wife's licence to remain is terminable by her misconduct. The word "terminable" is used advisedly, for the termination is at the option of the husband alone. In *Wabe v. Taylor*<sup>79</sup> the landlord attempted to take advantage of her lapse, but it was held that though her commission of a matrimonial offence entitles the husband to revoke the implied licence under which she remains, it does not entitle the landlord to possession if the husband takes no steps and the wife goes on paying the rent. In *R. v. Twickenham Rent Tribunal*<sup>80</sup> it was made clear that the wife's licence is a shield, and cannot be used as a sword; she cannot claim reduction of rent or security of tenure under the Rent Control Act, 1949, in respect of a rent-controlled house let to the husband.

### Conclusion

Are Professor Cheshire and Mr. Wade correct in their assumption that the courts have created a new equitable interest in land? The answer must depend on the meaning of the word "new." It is first necessary to decide whether the licence, furnished with its modern accoutrements, can claim admission, or have admission forced upon it, into one of the categories enumerated in the Land Charges Act, 1925. We have attempted to give reasons for believing that it cannot be regarded as a restrictive covenant. Is it an estate contract? Let us remember the statutory definition—<sup>81</sup>

"Any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other right."

Now this class is capable of constant expansion,<sup>82</sup> but only within the terms of the definition. It cannot include cases in which there is no notion of creating a legal estate, and none of the cases we have discussed contains this indispensable element. Is it an equitable easement? The statutory definition is—<sup>83</sup>

"Any easement, liberty or privilege affecting land and being merely an equitable interest."

<sup>78</sup> [1953] 1 Q.B. 762.

<sup>80</sup> [1953] 2 Q.B. 425.

<sup>82</sup> *Hanbury, op. cit.*, 470.

<sup>83</sup> Land Charges Act, 1925, s. 10 (1).

<sup>79</sup> [1952] 2 Q.B. 735.

<sup>81</sup> Land Charges Act, 1925, s. 10 (1).

This definition has remained sterile, for since 1925 there is no decided case which reveals to us the precise nature of the interests which the category may contain.<sup>84</sup> The Court of Appeal denied admission to a local authority requisitioning premises under Reg. 51 of the Defence of the Realm Regulations, in *Lewisham Borough Council v. Maloney*,<sup>85</sup> Somervell L.J. relying on the fact that "local land charges" are treated separately in section 15 of the Act for the restrictive interpretation of the term "equitable easement." A requisitioning authority, however, is in no sense a licensee,<sup>86</sup> and Professor Glanville Williams has argued that licences should be regarded as coming within the category.<sup>87</sup> But if he is correct, they are registrable, and if unregistered are void as against a purchaser of a legal estate from the licensor for money or money's worth. Denning L.J. has expressed the view that the place of registration is supplied by the possession of the licensee, which postulates notice.<sup>88</sup> He is supported, as regards the efficacy of such possession prior to 1926, by *Barnhart v. Greenshields*,<sup>89</sup> which lays down that the possession of the tenant is notice that he has some interest in the land, and a purchaser having notice of that fact is bound to inquire what that interest is. It is submitted that the same difficulty must have then obtruded itself as was propounded in *Brown v. Draper*,<sup>90</sup> as to whether the possession must needs be not only continuous, but unremitting. But whatever the pre-1926 law, Denning L.J. cannot be said to stand on firm ground when he advances the claims of possession by a tenant as an alternative to registration. Not only does section 14 of the Law of Property Act, 1925, merely safeguard the interests of a person in actual occupation, without any cross-reference to section 199 or to section 10 of the Land Charges Act, 1925, but his view is hardly reconcilable with *Coventry Building Society v. Jones*.<sup>91</sup> On

<sup>84</sup> See C. V. Davidge in 53 L.Q.R. 259; G. Cross in *The Bell Yard*, May, 1935, p. 18.

<sup>85</sup> [1948] 1 K.B. 50. It is worth while referring to the sequel to this case, *Borough of Lewisham v. Roberts* [1949] 2 K.B. 609. The authority released the ground floor, but the owner abused its kindness by refusing access to the part remaining under requisition; then the authority re-requisitioned, intending to allow the owner to occupy the ground floor as licensee, but as he continued to be difficult the authority terminated the licence and required him to deliver up the whole house; it was held entitled to do so.

<sup>86</sup> See *Minister of Agriculture v. Matthews* [1950] 1 K.B. 148.

<sup>87</sup> *Canadian Bar Review* (1952) 1004, 1013.

<sup>88</sup> *Bendall v. McWhirter* [1952] 2 Q.B. 466, 483; that he had arrived at the same view four years earlier may be deduced from his judgment in *Lewisham Borough Council v. Maloney* [1948] 1 K.B. 50.

<sup>89</sup> (1853) 9 Moo.P.C. 18. See also *Daniels v. Davison* (1809) 16 Ves. 249; *Reeves v. Pope* [1914] 2 K.B. 284; *Smith v. Jones* [1954] 1 W.L.R. 1089.

<sup>90</sup> [1944] K.B. 209.

<sup>91</sup> [1951] 1 All E.R. 901.



February 15, X bought No. 5 Bidston Avenue with vacant possession of the ground floor. The next day X agreed in writing with Y and Z, in consideration of their surrendering to her their tenancy of another house owned by her, to grant to them a weekly tenancy of the ground floor of No. 5. She then arranged for an advance from the society on a mortgage of No. 5 to enable her to complete the purchase. She told them she was securing vacant possession of the ground floor flat, but was silent as to her agreement with Y and Z of February 16. X let Y and Z into possession of the flat, and gave them a rent book. March 18 witnessed the completion both of X's purchase of No. 5 and of her mortgage thereof to the society, which excluded her statutory right to lease. The society sought possession of the flat against Y and Z. It was held that the two transactions of March 18 were, in effect, one transaction; there was no moment of time during which X was in a position to grant a tenancy to Y and Z. They might have fallen back on the agreement of February 16, had they registered it as an estate contract; but as they had omitted to do so, the society, under section 199 of the Law of Property Act, 1925, was unaffected by their rights.

It is submitted that Denning L.J. was wrong, if he intended to identify the right of a licensee with any of the equitable interests falling under the Land Charges Act, 1925. But surely no fault can be found with his view if he meant merely that the list of equitable interests is in no way closed by the legislation of 1925, that to equitable interests other than those there enumerated the old rules as to notice will continue to apply,<sup>92</sup> and that a purchaser will, in general, find a tenant's possession an unsurmountable obstacle in his path when he seeks to disclaim notice. That he meant no more than this is strongly suggested by *Lewisham Borough Council v. Maloney*,<sup>93</sup> in which he was himself concerned. The right of a requisitioning authority, not being an equitable easement, will not be void for non-registration, but will be good as against any but a bona fide purchaser for value.<sup>94</sup> The upshot of the whole matter must therefore be that if the interest of a licensee is to be regarded as an equitable interest, it is an equitable interest unknown to the Land Charges Act, and governed by the rules of equity concerning notice with which we were familiar before 1926.

<sup>92</sup> As they do to restrictive covenants between landlord and tenant, which are not capable of registration.

<sup>93</sup> [1948] 1 K.B. 50.

<sup>94</sup> It is arguable, however, that the right should be regarded as legal, not equitable.

## EVIDENCE EXCLUDED BY CONSIDERATIONS OF STATE INTEREST

J. E. S. SIMON \*

BROOME v. BROOME<sup>1</sup>

A WIFE petitioned for divorce on the ground of cruelty. The husband denied that he had been guilty of cruelty; and in his answer alleged that the petitioner had been guilty of adultery. The husband was a regular soldier of non-commissioned rank; and an issue in the case related to the circumstances in which the wife was received by the husband on her arrival at his station at Hongkong. There had been at Hongkong a representative of the Soldiers, Sailors and Air Force Families Association (SSAFA), a Mrs. Allsop. Differences had arisen between the husband and wife, and her good offices were invoked. She had made written reports of the case to her head office.

Before the hearing of the suit the solicitors for the wife had caused to be issued two subpoenas. The first was a *subpoena ad testificandum* directed to Mrs. Allsop. The second was a *subpoena duces tecum* addressed to the Secretary of State for War, relating to letters, copies of letters, memoranda and records made by SSAFA concerning the petitioner and respondent. The reason for the second subpoena being directed to the Secretary of State for War was that, for some reason which was left obscure, all the relevant SSAFA documents had come into the possession of the War Office. Counsel was instructed for the Crown, and he produced a certificate by the Secretary of State for War. This stated that, having read the correspondence and notes covered by the *subpoena duces tecum* addressed to him, he was of opinion that it was not in the public interest that the documents should be produced. His certificate went on: "I have read the correspondence and notes covered by the subpoena issued to me dated November 12, 1954, and I have considered the evidence which Mrs. Gwenneth Mary Allsop could give, as set out in a statement taken from her and submitted to the Treasury Solicitor by Messrs. Barton & Hanning, and I am of opinion that it is not in the public interest that the documents should be produced or the evidence of Mrs. Allsop given orally."

\* Q.C., M.P., of Trinity Hall.

<sup>1</sup> [1955] 2 W.L.R. 401.

Mr. Justice Sachs had little difficulty in holding that, so far as the documents were concerned, the claim for privilege was well founded. *Duncan v. Cammell Laird & Co.*,<sup>2</sup> *Ellis v. Home Office*,<sup>3</sup> *Ankin v. L. N. E. Ry.*,<sup>4</sup> and *Moss v. Chesham U. D. C.*<sup>5</sup> made it clear, in his view, that Crown privilege can attach irrespective of where a document originates or in whose custody it reposes. He therefore ruled that Crown privilege attached to all documents in the possession of the War Office.

The reason for seeking to exclude the evidence of Mrs. Allsop was stated to be the desire of the Crown to ensure that those works of SSAFA concerned with maintaining good relations between a serving husband and wife, and in particular its attempts at reconciliation, should be given the same sort of protection from disclosure in court as the efforts of probation officers and others specifically concerned with matrimonial reconciliation.<sup>6</sup> The head of public interest put forward was the maintenance of the morale of the armed forces. The particular case, however, had so developed that the evidence of Mrs. Allsop might well have been relevant to points which had arisen before there was any occasion for reconciliation between the parties—such as the accommodation available and general conditions in Hongkong. Mr. Justice Sachs held that until questions were put to the witness it was obviously impossible to tell whether or not they came within that area of SSAFA activities for which the Secretary of State for War was stated to desire protection. He therefore refused to set aside the subpoena.

Counsel for the Crown then suggested that he might listen to each question in turn and take on each question such objection as might seem right. But the learned judge held that the form of the certificate was not such as to enable the court to ascertain from its own wording what really was the nature of the evidence for which privilege was being claimed. He offered an adjournment for the purpose of either obtaining a clearer certificate or of testing his ruling on the subpoena in the Court of Appeal. Counsel for the Crown declined such an adjournment for either purpose; with the result that he ceased to have a *locus standi* in the case, but remained as *amicus curiae*.

The claim of the Crown to exclude the oral evidence thus failed.

<sup>2</sup> [1942] A.C. 624.

<sup>3</sup> [1953] 2 Q.B. 135.

<sup>4</sup> [1930] 1 K.B. 527.

<sup>5</sup> January 16, 1945, before Lynskey J.; unreported. I have to thank the Treasury Solicitor for my copy of the transcript.

<sup>6</sup> *MacTaggart v. MacTaggart* [1949] P. 94; *Mole v. Mole* [1951] P. 21. In this type of case, however, the privilege is that of the parties themselves and can be waived by them. In *Broome v. Broome* it was argued that the privilege was the Crown's, and could not be waived by the parties.



Mrs. Allsop was called. She spoke as to the way the wife was received at Hongkong, the accommodation which was available for wives, the suitability of the accommodation procured by the husband and as to the wife's health. On all these matters her evidence was held to have been of assistance to the court; and on none of them, said Mr. Justice Sachs, "was there any apparent cause for any intervention in the name of Crown privilege." This appears to have been conceded by counsel for the Crown.

Although Mr. Justice Sachs did not need finally to decide the substantive point, he did discuss it in his judgment as follows—

"Before the claims of the Crown to such wide privilege were held to be valid in law, my inclination would have been to call for argument on certain further points. First, whether the development of Crown privilege on the grounds of public interest might not now be regarded by the courts in the same light as development of new heads of public policy invalidating contracts, and new heads of criminal charges against individuals of acting to the public mischief; the tendency, in each of these matters, being for the courts not to develop fresh heads but to leave them to the legislature. Secondly, if development is to take place whether it might not be circumscribed by reference to certain specific heads of public interest, such as the safety of the realm, international relations, or the prevention and detection of crime. . . . Thirdly, whether the present method for claiming privilege in relation to specific documents is necessarily apt for claiming privilege in relation to a witness being asked in the box to answer questions, the precise form of which cannot be ascertained until counsel has put those questions in the light of the course the case takes at the trial. Whilst the courts have never been slow to prevent improper disclosure of matters truly injurious to the vital interests of the realm, I doubt whether it can rightly be said that the courts in the past have found themselves unable or are now unable to prevent such improper disclosure of matters (at any rate in relation to the reasonably circumscribed matter indicated above) without the Crown being held to have so wide an area of privilege by unexaminable certificate as it now seeks to assert."<sup>6a</sup>

It is clear that the contentions of the Crown in this case raise issues of high constitutional importance. It is the purpose of this article to discuss some of them: first of all, the basis and classification of the rule excluding certain evidence by reason of considerations of State policy or interest; secondly, whether the rule does in

<sup>6a</sup> [1955] 2 W.L.R. 401 at p. 408.

fact extend to oral testimony; and, thirdly, whether the law in this respect requires legislative modification.

#### THE NATURE AND CLASSIFICATION OF THE RULE

The result of previous authorities was summed up in the speech of Viscount Simon giving the judgment of the House of Lords in *Duncan v. Cammell Laird & Co.*<sup>7</sup>; and this case now contains a full and authoritative exposition of the law.

In 1939 the submarine *Thetis*, which had been built by the respondents under contract with the Admiralty, was lost during her trials with great loss of life. The personal representatives of dependants of the deceased claimed damages from the respondents. The respondents in their Affidavit of Documents objected to producing a number of documents or copies of documents which they had acquired or made in their capacity of contractors to the Admiralty. The Treasury Solicitor had directed the respondent company not to produce the documents and copies, and to object to their production; and the First Lord of the Admiralty swore an affidavit stating that he had "formed the opinion that it would be injurious to the public interest that any of the said documents should be disclosed to any person." The House of Lords held that the documents could not be produced.

The following principles can be ascertained from the case—

(1) Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld.

(2) This test is satisfied either

- (a) by having regard to the contents of the particular document; or
- (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production; *e.g.*, departmental minutes.

(3) The decision to object should be taken by the Minister who is the political head of the department. He should himself have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced.

(4) If the question arises before trial, the objection should ordinarily be taken by affidavit of the Minister. If it arises on subpoena, the objection may in the first instance be conveyed to the court by an official of the department, who produces a certificate signed by the Minister stating what is necessary; but if the court is not satisfied it can request the Minister's personal attendance.

<sup>7</sup> [1942] A.C. 624.

(5) The mere fact that the Minister or department does not wish the document to be produced is not an adequate justification for objecting to its production. Production should only be withheld when public interest would otherwise be damnified, *e.g.*,

(a) disclosure injurious to national defence or good diplomatic relations; or

(b) the practice of keeping a *class* of documents secret is necessary for the proper functioning of the public service.

(6) An objection validly taken to production on the ground that it would be injurious to the public interest is conclusive. The court should not require to see the documents for the purpose of itself judging whether disclosure would in fact be injurious to the public interest.

(7) The above principles apply equally in suits between private citizens, where in the course of these suits a government department is called on to produce documents.

It will be seen that the exclusion is not confined to official communications or documents, but extends to all others likely to prejudice the public interest. Thus, a copy of a letter written by the Anglo-Persian Oil Company containing confidential information from the Board of Admiralty was held privileged from inspection, the proper officer of the Admiralty having directed this non-production on the ground that its production would be detrimental to the interests of the State.<sup>8</sup> On the other hand, an official report, even though it relates to purely commercial matters, is absolutely privileged.<sup>9</sup>

The rule is often spoken of as that of "Crown Privilege." Halsbury,<sup>10</sup> indeed, deals with it as an example of those cases where a competent witness may in certain cases claim the privilege of refusing to disclose relevant matter. As such it is classified with the privilege of a judge of the Superior Courts to refuse to give evidence as to judicial proceedings that have taken place before him; a similar privilege of jurors; the privilege which protects legal professional communications from disclosure; or communications between husband and wife during marriage; or title deeds (except those of a party to the action); or answers which might criminate a witness.

Phipson,<sup>11</sup> on the other hand, has a general category, "Evidence

<sup>8</sup> *Asiatic Petroleum Co. v. Anglo-Persian Oil Company, Ltd.* [1916] 1 K.B. 822.

<sup>9</sup> *M. Isaacs & Sons, Ltd. v. Cook* [1925] 2 K.B. 391. This was a case of defamation; and the document in question was a report of the High Commissioner for Australia to his Government.

<sup>10</sup> 2nd ed., Vol. XIII, pp. 474 *et seq.*

<sup>11</sup> Phipson, *The Law of Evidence*, 9th ed., 1952, pp. 196 *et seq.*



excluded by Public Policy." This embraces the following sub-categories: first, Affairs of State, including deliberations of Parliament, State secrets and papers, and communications by or to public officials in the discharge of their official duties; secondly, information for the detection of crime; thirdly, judicial disclosures; and, fourthly, until recently, statements by parents bastardising their offspring.<sup>12</sup> He lists as an entirely separate category "Facts excluded by Privilege." This category includes the following sub-categories: first, legal professional communications; secondly, title deeds; thirdly, matrimonial communications; and, fourthly, criminal answers and questions and answers tending to suggest adultery in some divorce cases.<sup>13</sup>

A privilege normally belongs to the parties and can be waived. Where a fact is excluded by considerations of public policy there is no power of waiver in the parties. As Lord Simon said in *Duncan v. Cammell Laird & Co.*,<sup>14</sup> "The withholding of documents on the ground that their publication would be contrary to the public interest is not properly to be regarded as a branch of the law of privilege connected with discovery. 'Crown privilege' is for this reason not a happy expression. Privilege, in relation to discovery, is for the protection of the litigant and could be waived by him, but the rule that the interest of the State must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation, and, indeed, is a rule on which the judge should, if necessary, insist, even though no objection is taken at all. This has been pointed out in several cases, e.g., *Chatterton v. Secretary of State for India*, per A. L. Smith L.J."<sup>15</sup>

*Chatterton v. Secretary of State for India in Council*, the case cited by Lord Simon, was in an action for libel founded on a dispatch from the Commander-in-Chief in India to the Indian Government. It was held that a communication relating to State matters made by one officer of State to another in the course of his official duty is

<sup>12</sup> See *Russell v. Russell* [1924] A.C. 697; Law Reform (Miscellaneous Provisions) Act, 1949, s. 7 (1) and (2) repealed and re-enacted in Matrimonial Causes Act, 1950, s. 32 (1) and (2).

<sup>13</sup> Taylor on *Evidence*, 12th ed., 1931, pp. 572 *et seq.*, stands between Halsbury and Phipson. He classifies "Matters which are State Secrets" under a general heading of "Evidence excluded on grounds of Public Policy," together with communications between husband and wife during marriage, communications with legal professional advisers, evidence of judicial personages and of counsel, and indecent matters.

<sup>14</sup> [1942] A.C. 624, at pp. 641, 642.

<sup>15</sup> [1895] 2 Q.B. 189, 195. See also per Lord Esher M.R. at p. 191: "A judge at the trial would be bound to refuse to allow such an inquiry to proceed, whether any objection be taken by the parties concerned or not."

absolutely privileged and cannot be made the subject of an action for libel. But all three members of the Court of Appeal based their decision not only on the fact that an official communication is absolutely privileged under the law of defamation but also on the fact that the document on which the libel was founded must be excluded from evidence as an Act of State.

*Duncan v. Cammell Laird & Co.* and *Chatterton v. Secretary of State for India in Council* show how remote the rule is from the branch of jurisprudence relating to discovery of documents or even to privilege. It is therefore submitted that Phipson's classification of the rule is the correct one.

#### ORAL TESTIMONY

There is clear authority that if the original document falls within a class of document which is excluded by public policy, a copy is equally excluded. Thus in *Duncan v. Cammell Laird & Co.*<sup>16</sup> many of the documents the disclosure of which was withheld were copies kept by the contractors. In *Ankin v. L. N. E. Ry.*<sup>17</sup> a copy of a statutory report made to the Ministry of Transport by the defendants was excluded. In *Moss v. Chesham U. D. C.*,<sup>18</sup> Lynskey J. said, "In my opinion, if it is contrary to public interest to produce the original documents, it must equally be contrary to public interest to produce copies which the maker of the document has kept for his own information."

But if copies of documents are excluded from evidence on the ground of public policy, it is submitted that the rule must equally apply to oral testimony concerning their contents. This would appear both on principle and on authority. It is a general rule that there are no degrees of secondary evidence: once secondary evidence of a document is admissible a party is at liberty to adduce any admissible description of secondary evidence he may choose,<sup>19</sup> including oral testimony and admissions, or indeed circumstantial or presumptive evidence.<sup>20</sup> In *Chatterton v. Secretary of State for India in Council*,<sup>21</sup> Kay L.J. said "What is said in that case<sup>22</sup> appears to be authority for the proposition that a document such as that upon which this action is founded is one which cannot form the subject-matter of an action, because, on the ground of public policy, the court cannot allow it to be given in evidence, or

<sup>16</sup> [1942] A.C. 624.

<sup>17</sup> [1930] 1 K.B. 527.

<sup>18</sup> January 16, 1945, before Lynskey J.; unreported (see p. 63, note 5 above).

<sup>19</sup> *Brown v. Woodman*, 6 C. & P. 206; *Doe v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 M. & G. 242.

<sup>20</sup> *R. v. Fordingbridge*, 27 L.J.M.C. 290.

<sup>21</sup> [1895] 2 Q.B. 189, 195.

<sup>22</sup> *Home v. Bentinck*, 2 B. & B. 130.

secondary evidence of it to be given." *Hughes v. Vargas*<sup>23</sup> was an action for libel. The original document was excluded on a certificate that its production would be prejudicial to discipline and to the interests of the service (the Inland Revenue). The evidence of clerks in the office who had seen the report seems to have been available, but equally to have been excluded; for the action was dismissed on the judge ruling against production of the original document. In *Moss v. Chesham U. D. C.*<sup>24</sup> Lynskey J., having ruled that neither the original document nor a copy could be produced, was asked by counsel, "Your Lordship's ruling will also apply to any oral evidence which my learned friend seeks to tender as to what my client is alleged to have said at the Inquiry was part of the contents of this document?" Lynskey J. replied, "My ruling is intended to include all forms of secondary evidence of that document."

If the rule excludes secondary oral evidence of documents the production of which would be contrary to public interest, does it exclude oral testimony of other facts the proof of which would have a similar effect? In principle there appears to be no logical distinction. It is not generally the document the disclosure of which is injurious to public interest, but the facts stated therein. If a written communication between the East India Company and the Board of Control in India<sup>25</sup> is to be excluded on grounds of public policy, so equally must an oral communication to the same effect. If a written communication to the Lord Chamberlain in relation to his official duties is barred from proof,<sup>26</sup> proof of oral communications would appear to be equally damaging to the public interest—and damage to the public interest is the foundation of the rule. To draw a distinction between written and oral communications would be particularly absurd in these days of telephone and wireless communication.

<sup>23</sup> (1893) 9 T.L.R. 551.

<sup>24</sup> January 16, 1945, before Lynskey J.; unreported (see p. 63, note 5 above).

<sup>25</sup> *Smith v. East India Company*, 1 Ph. 50. In this case Lord Lyndhurst said (at p. 55): "It is quite obvious that public policy requires, and looking to the Act of Parliament, it is quite clear that the Legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious, that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests." This would appear to cover communications between a Minister and the head of a Nationalised Industry.

<sup>26</sup> *West v. West* (1911) 26 T.L.R. 476.



The same conclusion is reached by analogy from the other sub-categories falling within the general category of Facts excluded by Public Policy. In those cases oral communications are excluded equally with written. Thus, in cases of information for the detection of crime a witness cannot even be asked whether he was himself the informer.<sup>27</sup> Judges of the Superior Courts cannot be compelled to testify to matters which have arisen before them in other trials.<sup>28</sup> An oral statement by a parent bastardising his issue was equally excluded with a written document to the same effect.<sup>29</sup> Some analogy, too, is provided from the category of facts excluded by privilege. Thus oral professional confidences or matrimonial communications are excluded as well as documentary; while answers to criminating questions and questions as to adultery are necessarily oral testimony.

It is submitted that these considerations amply support the *obiter dictum* of Lord Simon in *Duncan v. Cammell Laird & Co.*, which he did not, however, support by argument or consideration of authority: "The same principle must also apply to the exclusion of oral evidence which, if given, would jeopardise the interests of the community."<sup>30</sup>

Apart from this dictum no direct authority was produced in *Broome v. Broome* in support of the submission of the Crown that the evidence of Mrs. Allsop should be excluded: and, in the absence of compelling authority, Sachs J. was not disposed to accept the extension of the rule to cover oral testimony, except, possibly, secondary oral evidence of excluded documents. Such authority does, however, appear to exist. In 1831 William Cobbett was prosecuted for publishing a seditious libel and was tried before Lord Tenterden C.J. and a special jury.<sup>31</sup> The defendant called as his witness Lord Melbourne, the Home Secretary. He proposed to ask Lord Melbourne on what ground a certain prisoner had received the royal pardon. On objection by the Attorney-General, Lord Tenterden ruled that that could not be inquired into.<sup>32</sup> Later in the trial Cobbett proposed to ask a witness whether it would not be wise if his advice were followed with respect to the measures to be adopted to put a stop to the disturbances in the country; whereupon Lord Tenterden said, "No, I cannot permit that. *That*

<sup>27</sup> *Att.-Gen. v. Briant*, 15 M. & W. 169.

<sup>28</sup> *R. v. Gazard*, 8 C. & P. 595; *R. v. Harvey*, 8 Cox 99; *Buckleuch v. Metropolitan Board of Works*, L.R. 5 H.L. 419.

<sup>29</sup> See *Russell v. Russell* [1924] A.C. 687.

<sup>30</sup> [1942] A.C. 624 at p. 643.

<sup>31</sup> *R. v. William Cobbett* (1831) 2 St.Tr.(n.s.) 789.

<sup>32</sup> *Ibid.*, p. 873.

would be a question of advice upon matters of State. I cannot permit that.”<sup>33</sup>

It is submitted, therefore, that even though, as Sachs J. suggested, the development of Crown privilege on the grounds of public interest might now be regarded by the courts in the same light as developments of new heads of public policy invalidating contracts and new heads of criminal charges against individuals of acting to the public mischief, the rule already extends to exclude oral testimony of facts the forensic publication of which would be contrary to public interest. His second query, namely, whether the rule, so far as it relates to oral testimony, might not be circumscribed by reference to certain specific heads of public interest, such as the safety of the realm, international relations or the prevention and detection of crime, seems also to have been answered. The evidence which Cobbett sought to elicit went beyond these categories.

The third difficulty which Sachs J. envisaged is, however, a substantial one: how is oral evidence to be excluded? In *Broome v. Broome* the Secretary of State sought to have the *subpoena ad testificandum* set aside on the ground, based on a reading of a proof of evidence, that the witness could give no evidence which it would not be in the public interest to exclude. The subsequent course of the trial showed this to be in any event a mistaken view. The application to set aside the subpoena was based on *R. v. Baynes*.<sup>34</sup> There a *subpoena ad testificandum* addressed to the Prime Minister and the Home Secretary of the day was set aside as an abuse of the process of the court on their swearing by affidavit that they knew nothing of the matters in issue. Sachs J. had no difficulty in distinguishing that case, for in *Broome v. Broome* the witness could give relevant evidence and the subpoena was in no way oppressive. Further, as Sachs J. said, “An application to set aside the subpoena would, if granted, have prevented the witness even being sworn, and would certainly have prevented her from giving evidence of any fact, whether or not it was against the public interest to disclose. Further, any certificate in a ‘blanket form’ which stopped a witness going into the witness box seems contrary in principle to those portions of the decided cases which enjoin Ministers before giving a certificate as regards documents to examine each in turn in the light of the issues arising in the case.”

This argument seems unanswerable. Indeed, to concede the claim of the Crown would be to give the Crown power to prevent

<sup>33</sup> *Ibid.*, p. 877 (our italics).

<sup>34</sup> [1909] 1 K.B. 285.

certain classes of witness, for example, civil servants, from having to give evidence in court; just as the Crown already enjoys the right, and does in fact exercise the right, to exclude whole classes of document from proof—for example, departmental minutes—whether or not the forensic publication of the contents of the particular document would be in the slightest degree injurious. Such a concession would indeed have the most momentous constitutional repercussions; and one must be grateful that it found no favour in the eyes of the learned judge concerned.

Nevertheless, even though a “blanket” certificate based on a proof of evidence is an inapt way to prevent oral disclosure of facts the publication of which is contrary to public interest, it does not follow that such facts should be admitted to proof. It is, after all, a matter of machinery—designed to protect the interests of the State, but to ensure at any rate that the Minister himself takes personal responsibility that they are not abused. The machinery of affidavit, and the subsequent personal appearance of the Minister in court if required, was devised as appropriate to documentary evidence. Some different machinery is required for oral evidence. The sort of procedure appropriate was, indeed, indicated in *Broome v. Broome*. First, a perfectly clear affidavit from the Minister indicating the precise scope of the evidence the proof of which he certifies to be against the public interest. It would, in addition, probably be desirable, for the assistance of the court in determining exactly what evidence to exclude, if the Minister further stated in what respect the offensive evidence is prejudicial to the public interest. Secondly, the attendance in court of counsel on behalf of the Minister to listen to the questions, and to object to any answer being given to those the tendency of which would be to elicit facts the proof or publication of which would be against the public interest. Where the subject-matter is important and where the precise scope of the offending evidence is difficult to determine in advance, it would no doubt be desirable for the Minister to attend court in person. On the other hand, the absence of any intervention by the Crown should not prevent the judge himself excluding evidence proof of which is on the face of it against the public interest or which falls within any of the categories of excluded facts which have already been judicially determined.

#### REFORM OF THE LAW

In *Duncan v. Cammell Laird & Co.*<sup>35</sup> Viscount Simon said: “This question is of high constitutional importance, for it involves a

<sup>35</sup> [1942] A.C. 624 at p. 629.



claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This material one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases equal justice may be prejudiced."

The withholding of relevant facts from proof is clearly on the face of it liable to prejudice the administration of justice. Most practitioners have had experience where they have felt that the withholding of documents by the Crown has hindered the effective presentation of their case.<sup>36</sup> In some cases the judge has himself felt and expressed anxiety as to whether the exclusion of such evidence might not affect the administration of justice in the particular case. Thus, *Odlum v. Stratton*<sup>37</sup> was an action for libel brought by a farmer against the chairman of a War Agricultural Committee; and one of the issues related to the plaintiff's efficiency as a farmer. There were a number of contemporary records and reports made by the Committee and communications between the Committee and the Minister. The Ministry of Agriculture claimed privilege for all of these.<sup>38</sup> Atkinson J. considered that their disclosure would have been of the utmost assistance in arriving at the truth. In the result the withholding of the documents the disclosure of which the plaintiff sought did not prevent his succeeding in the action; though a reading of the verbatim report leaves little doubt that his task would have been facilitated by full disclosure. In *Ellis v. Home Office*,<sup>39</sup> a prisoner in gaol was seriously assaulted by a fellow prisoner. The plaintiff alleged that this was due to the negligence of servants of the Home Office, who knew, or should have known, that the assailant was unsafe. The Crown claimed privilege for police reports and medical reports on the behaviour of the assailant before the assault. Devlin J. while dismissing the action, said ". . . I must express, as I have expressed during the hearing of the case, my uneasy feeling that justice may not have been done because the material before me was not complete, and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done." There can be little doubt that the rule does on occasions result in miscarriage of justice.

<sup>36</sup> On certain occasions, of course, an action cannot be got on its feet at all because the vital document on which the claim is founded is absolutely privileged.

<sup>37</sup> Before Atkinson J., July 21-29, 1949. A verbatim report of the proceedings was published by the Wiltshire Gazette Printing Works, Devizes. I have to thank Prof. C. J. Hamson for my copy of this case.

<sup>38</sup> Curiously enough, two documents out of the series were exempted from the ban. They were documents which told against the plaintiff; and Atkinson J. expressed himself in little doubt that that was why they were produced.

<sup>39</sup> Reported on appeal [1953] 2 Q.B. 135.

Few would question the necessity of a rule to exclude evidence which would cause serious prejudice to the State. Litigants are part of the general body of subjects who would be injured by disclosure; and justice between citizen and citizen is only one of the matters, however important, that go to make up the public weal. For example, in the *Thetis* case,<sup>40</sup> the plaintiffs failed to recover against any of the defendants; and no doubt felt that the fact that important documents had been withheld may have affected the result. On the other hand if the blue prints, which were among the documents the disclosure of which were sought, had been produced, they would have shown that the *Thetis* class submarines were armed with tubes which could fire backwards under water. That was a secret at the time, and we were at war. Few would say that the First Lord was wrong in refusing disclosure.<sup>41</sup>

It is because such considerations of national security can neither properly be weighed nor safely discussed in a court of law that the Minister's certificate is taken to be conclusive. The Lord Chancellor, Viscount Jowitt, during the Parliamentary discussion of the Crown Proceedings Act, 1947,<sup>42</sup> quoted<sup>43</sup> effectively from Lord Parker of Waddington's speech in *The Zamora*<sup>44</sup>: "Those who are responsible for the national security must be the sole judges of what the national security requires."

But, in truth, to put the matter thus is to put it most tendentiously. For the rule extends far beyond considerations of national security: it embraces the widest considerations of public interest. It is true that the executive is solely responsible for the national safety, including foreign relations: and certainly no other constitutional organ could judge so well of such matters. But the executive is not solely responsible for the public interest. It represents an important element in it; but there are other elements. One such other element, for example, is the administration of justice. Another, indeed, is the desirability of placing a limitation on the powers and activities of the executive, in order that the individual

<sup>40</sup> *Duncan v. Cammell Laird & Co.* [1942] A.C. 624.

<sup>41</sup> This information was divulged by Viscount Simon on the Third Reading of the Crown Proceedings Act, 1947, in the House of Lords: see Parliamentary Debates, Lords, Vol. 146, cols. 927-8.

<sup>42</sup> S. 28 of that Act took away the immunity of the Crown from discovery, but provided that this should be "without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest."

<sup>43</sup> Parliamentary Debates, Lords, Vol. 146, col. 924. Viscount Jowitt was supported in this respect by Viscount Simon, *ibid.*, cols. 926-9, and Lord Simonds, *ibid.*, cols. 932-3.

<sup>44</sup> [1916] 2 A.C. 77 at p. 107.

citizen may enjoy the widest possible field of choice and liberty compatible with the freedom of others. The claim of the Crown to have exclusive and conclusive power to determine what is in the public interest is the forensic concomitant of the politico-economic claim that the gentleman in Whitehall necessarily knows best what is in the interest of the citizen. It is a similar "public interest" to that which for years demanded that the only new office-building should be for Government offices. Indeed, the claim of the Crown to exclude evidence is even more likely to operate to subserve a partial "public interest" viewed exclusively from a narrow departmental angle; since it will not, like major administrative decisions, reflect a balanced executive view come to as a result of Cabinet deliberation. The Minister will inevitably take cognisance of the public interest as it is seen from his own departmental angle, including its administrative convenience. It is almost impossible for him to give equal weight to another matter of public interest—namely that justice should be done, and be seen to be done, between citizen and citizen, or citizen and the State.

The law, indeed, appears to be unnecessarily rigid in this sphere. While there are overwhelming arguments in favour of giving to the executive an exclusive power to determine what matters may prejudice the public *security*, those arguments give no sanction for extending to the executive an equally exclusive power to determine what matters may affect the public *interest*. And since the Minister cannot fairly weigh the degree of injury to the State by the disclosure of the document against the degree of injury to a private citizen from its non-disclosure, there seem to be strong grounds for removing the decision from him and vesting it in an independent tribunal; for example, a judge of the High Court. The Minister's decision as to what evidence should be excluded by considerations of public *security* should be conclusive; but any claim based on his own considerations of public *interest* should be examinable, and should be balanced against such other considerations of public interest as are urged by those seeking disclosure. The possible injury suggested in *Broome v. Broome*<sup>45</sup> to the morale of the armed forces if the evidence were admitted could be weighed against the probable injury to the morale or the material interests of the litigants, or one of them, or to the administration of justice, if it were excluded.<sup>46</sup>

It is sometimes argued that, if the decision were vested in

<sup>45</sup> *Supra*, note 1.

<sup>46</sup> This distinction between considerations of public security and considerations of public interest reflects in a different context the suggestion of Sachs J. that the public interest in question might be limited to specific heads.



the judge, where the Crown is itself a litigant the court would necessarily have to look at one party's document without its disclosure to the other party, for the purpose of deciding whether it should be disclosed.<sup>47</sup> In some cases the court might well require explanation from the Crown as to the exact nature of the public interest in question, and as to how the particular evidence could possibly impair it; and the explanation, if given openly, might itself be equally injurious to the public interest as the disclosure of the evidence. It is a fundamental principle of British justice that it should be done openly in the presence of both parties and that the judge should not communicate with one party to the exclusion of the other.

But once considerations of national security are left on one side, there are few matters of public interest which cannot safely be discussed in public. In any case, here again the law is unnecessarily rigid. It appears from *Duncan v. Cammell Laird & Co.*<sup>48</sup> that only two sets of circumstances are envisaged in this branch of jurisprudence: first, where the documents must be published to all the world by production in open judicial proceedings; and, secondly, where the document must be absolutely withheld. But the Administration itself knows many classes of security document, ranging from those merely reserved for office use to those which can be seen only by a handful of Ministers or officials rigorously screened and bound by oath of secrecy. There would be no difficulty in such grading being reflected in forensic practice.

The following sets of circumstances might be envisaged:—

(1) The document may safely be seen by all the world.

(2) It would be desirable for the document to be in some measure restricted in its forensic publication; but this consideration ought to yield to the greater desirability that justice should manifestly be seen to be done.

(3) The document might be disclosed to the parties (or the opposite party, if the Crown is a party) on their undertaking to the court, so as to render a breach a contempt of court, not to disclose its contents to any person except for the purpose of the proceedings in question or by order of the court.

(4) The document might be disclosed to the parties (or the opposite party, if the Crown is a party) on condition that it should not be produced or referred to except in closed court. Any further publication would then automatically be punishable as contempt of court.<sup>49</sup>

<sup>47</sup> See Parliamentary Debates, Lords, Vol. 146, cols. 924–5 (Viscount Jowitt), col. 929 (Viscount Simon).

<sup>48</sup> [1942] A.C. 624.

<sup>49</sup> Cf. *Scott v. Scott* [1913] A.C. 417.

(5) The document might be disclosed to the trial judge, but not to the parties (or the opposite party, if the Crown is a party).

(6) The document might be disclosed to a judge for the purpose of determining its degree of forensic publication; but he might hold that its evidential importance is so slight that its further forensic publication is not justified in the light of its possible prejudice to the public interest.

(7) The document being of a highly secret and confidential nature, its forensic publication in any form or circumstances must be absolutely withheld.

The last four heads require separate consideration:

*No. 7.* It would be reasonable in this case, as where the publication would be prejudicial to the public security, to accept the Minister's certificate as conclusive.

*No. 6.* This envisages that application is made to a judge in chambers before trial in order to determine the degree of forensic publication which is appropriate. It might well involve the judge seeing a document not at that stage disclosed to the other side. But this is no new thing in our law. Under R.S.C. Ord. 31, r. 19 (a) (2) the Master (or, on appeal, the judge) may look at one party's document for which privilege is claimed in order to determine whether it should be disclosed to the other. In any case, all objection would disappear if the power in a court to look at a document in the absence of a party were made dependent on the consent of that party.

*No. 5.* The same observation applies. It would be reasonable to stipulate that, where the Crown is a party, the court should look at a document produced by the Crown without its disclosure to the other party only if such other party consents to this course.

*No. 4.* The court already has inherent jurisdiction to sit in closed court wherever a hearing in open court would defeat the ends of justice.<sup>50</sup> Thus the court will sit in closed court to hear certain actions relating to trade secrets<sup>51</sup>; and the Court of Appeal frequently sits in closed court to hear appeals relating to the custody of infants.<sup>52</sup> Section 8 (4) of the Official Secrets Act, 1920, gives power to the court to order the exclusion of the public from any proceedings under the Official Secrets Acts on the ground that

<sup>50</sup> *Scott v. Scott* [1913] A.C. 417.

<sup>51</sup> *Andrew v. Raeburn* (1874) L.R. 9 Ch. 522; *Mellor v. Thompson* (1885) 31 Ch.D. 55; *Badische Anilin und Soda Fabrik v. Levinstein* (1883) 24 Ch.D. 156.

<sup>52</sup> A hearing in open court will generally be to the detriment of the infant, and the paramount object of the jurisdiction is to promote the welfare of the infant; *Guardianship of Infants Act, 1925*, s. 1; *Thain v. Thain* [1926] Ch. 676.

publication of any evidence to be given in the course of the proceedings would be prejudicial to the national safety. There seems no reason why a similar machinery should not be available to prevent the injustice which might otherwise occur through the withholding of evidence that cannot be disclosed in open court.

Once the rigidity of the law is thus modified in respect of documents the disclosure of which are alleged to be contrary to the public interest, there seems every reason to make the machinery also available in the case of documents the disclosure of which is alleged to be prejudicial to the public security. The decision as to the degree of forensic publication which is acceptable would still be the Minister's; but he would be required to say whether the document falls into Classes (2) to (5) above on the one hand, or whether, on the other, its forensic publication in any form would be injurious to the public security. His certificate should be conclusive; but if he states that it falls into Class (4), then there should be power to order a hearing or partial hearing in closed court.

For convenience, documentary evidence only has been discussed, but the argument is equally applicable to oral evidence.

#### CONCLUSION

It has been submitted that the rule of law excluding evidence of facts the disclosure of which would be contrary to the public interest extends to oral evidence. On the other hand it appears that an unexaminable certificate seeking to exclude a witness from giving evidence, and not sufficiently specifying the type of oral evidence which is alleged to be prejudicial, is inappropriate and insufficient. To meet the case of oral evidence the court needs a more flexible procedure, in which the Minister by his affidavit makes it precisely clear what is the exact type of evidence he desires to exclude and also, in order to facilitate the task of the court in ruling on the admissibility of particular items of evidence, the head of public interest with reference to which he desires to exclude it.

The unequal disclosure of material is inherently likely to work injustice, and there is ground for thinking that injustice has in fact been caused by the wide scope and the rigidity of the present rules. It has been submitted that the interest of the executive can be conveniently reconciled with the claims of the private litigant for justice if it were possible to stipulate various degrees of forensic publication. Of these, the most important, between absolute withholding and full disclosure, would be the hearing of the questioned evidence in closed court. It is considered that the Minister should still be given an absolute discretion to state whether any



particular evidence would be prejudicial to national security, or so prejudicial to the public interest that its forensic publication in any form must be barred. If he states that full disclosure of the evidence would be prejudicial to the national *security*, but that it could be disclosed in closed court, there should be power to order a hearing in closed court. So far as concerns evidence of facts the disclosure of which the Minister alleges to be contrary to the public *interest*, unless he is prepared to certify that the forensic publication of the evidence in any form must on the ground of its high secrecy and confidential nature be absolutely withheld, the question of its degree of disclosure would be for a judge of the High Court. He would weigh considerations of public interest as stated by the Minister against considerations of public interest as urged by the party seeking disclosure; and would have power to order a limited forensic publication, including its disclosure only in closed court.

### *Postscript*

In *Iwi v. Montesole* (Donovan J., March 7-14, 1955), a libel action, the Crown claimed the exclusion of evidence of oral and written communications between the chairman of a bench of magistrates on the one hand and, on the other, the Lord Chancellor, officials of his Department and the Advisory Committee which has the duty of advising the Lord Chancellor on appointments to the bench, concerning the suitability for her official duties of a member of the bench. The head of public interest put forward was the necessity of completely frank and confidential communication on such matters, which might be vitiated if they were known to be liable to subsequent publication in a court of law. Certain of the communications had already been published by the Lord Chancellor in the House of Lords and had been reproduced in the publicly printed Parliamentary Debates; but it was alleged that they formed part of a more extensive correspondence. Both parties protested that they would be hindered in the presentation of their case if the evidence were excluded. Donovan J. recognised that "all these questions of privilege involve prejudice to the litigant," but upheld the claim of the Crown.

## THE PERSONNEL OF THE CRIMINAL LAW IN ENGLAND AND THE UNITED STATES

J. C. SMITH \*

THE success of any system of law depends, in the last resort, on the personnel who administer it. However perfect the procedure of a system may be in theory, it will not work well in practice if the officials who operate it are inefficient or lack proper powers: whereas, with efficient personnel having adequate powers, imperfections of procedure may be of little consequence. The fundamental principles of criminal procedure are the same in England and the United States; yet in the one country there is satisfaction, amounting, perhaps, to complacency, with the operation of the criminal law; while in the other there is almost universal dissatisfaction. This dissatisfaction has provoked a great deal of detailed research in America into the deficiencies of criminal justice, by both public commissions and private individuals, and, consequently, the publication of much frank and vigorous criticism. An examination of this criticism shows that, in the opinion of the American commentators, the factor of personnel is at the root of a great many of their troubles.

It is indeed the submission of this article that the important differences in the actual administration of the criminal law in England and America arise, in large measure, from the difference in status and character of the personnel who administer the law; and, in particular, from the differences in the distribution of powers among them. A comparison of some aspects of the powers, prestige, character and abilities of the judges, juries and counsel who, between them, are responsible for dispensing criminal justice in the higher courts in the two countries, will, it is believed, reveal that this is so.<sup>1</sup>

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<sup>1</sup> The observer of a foreign system can see so little personally that reliance must necessarily be placed very largely on the observations of those who live with the system. No apology is therefore made for the high proportion of subsequent material which appears in quotation marks.

The works principally referred to are: The Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland: *Criminal Justice in Cleveland* (1922); The Reports of the National Commission on Law Observance and Enforcement (The "Wickersham Commission") on "Criminal Procedure"; "Prosecution" and "Lawlessness in

It is important to bear in mind that in the United States there is not only one, there are forty-nine distinct criminal law jurisdictions. The administration of criminal justice is predominantly committed to the care of the forty-eight states, and each state enacts its own substantive and procedural law of crime. Congress does not interfere at all with the criminal law of the state, and the United States Supreme Court has the merely negative function of subjecting convictions in the state courts to the scrutiny authorised by the "Due Process of Law" clause of the Fourteenth Amendment to the United States Constitution. This clause ordains: "nor shall any state deprive any person of life, liberty, or property, without due process of law." The Supreme Court has held that "due process of law" empowers and requires it to quash any conviction, brought before it by writ of certiorari, which "offends those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offences."<sup>2</sup> Subject to this somewhat vague safeguard the administration of the criminal law is entirely a matter for the individual state.

There exists also a federal criminal law which has developed as a system distinct from that of the states. It has two major branches: the first is concerned with the control of the territories directly administered by the federal government; the second is concerned with such matters as treason, piracy, sedition, interference with the U.S. mails, the collection of the internal revenue, inter-state communication and other federal functions.<sup>3</sup> This second body of law is administered by federal judges in federal courts in each state, side by side with the state courts. Though the federal criminal jurisdiction is of considerable and increasing importance, it is the state courts that are concerned with the ordinary day-to-day crimes—homicide, larceny, bigamy, etc.—and it is with the administration of justice in these courts, therefore, that this article is concerned. Now the general outlines of criminal practice and procedure are the same in the great majority of states, but there are, of course, some differences between any two of them. Generalisation about American criminal justice is, therefore, necessarily dangerous. Nevertheless it is believed that there are enough characteristics common to all the states to make a discussion of American criminal justice, as such, practicable and useful.

Law Enforcement" (1931); Roscoe Pound, *Criminal Justice in America* (1930); Lester B. Orfield, *Criminal Procedure from Arrest to Appeal* (1947); Henry T. Lummus, *The Trial Judge* (1937).

<sup>2</sup> Frankfurter J., *Rochin v. California*, 342 U.S. 165; 72 Sup.Ct. 205; 96 L.Ed. 183 (1952).

<sup>3</sup> (1936) 22 A.B.A.J. 345.



## THE POSITION OF THE JUDGE

It is convenient to consider first the position of the trial judge. An observer cannot fail to note that judicial office—excepting the judges of the Supreme Court of the United States—is much more highly regarded in England than it is in America. An American professor, visiting England, summed up the position as follows: “In England the High Court judge is in public estimation just one stage below the Royal Family; in America he is just a guy with another job.” This may be an exaggeration, but it certainly contains more than a grain of truth. The difference in attitude has a long history. The majority of American states, in working out the position of the judge, seem to have thought, not of the independent English judge of the period after the Revolution of 1688, but of the judge of Stuart England, holding office at the pleasure of the Crown. Fear and distrust of judges of this type brought about even in colonial times a serious curtailment of the judicial power to control the trial and to keep a check on the jury. The hostility to everything associated with the British Crown which prevailed after the Revolution did nothing to strengthen the position of the judge. But it was the American passion for democracy which, between 1830 and 1850, brought about the most fundamental change in judicial status in the states. There was, during that period, an enthusiastic movement in America for the theoretically complete régime of democracy advocated by Jefferson and his followers. Jefferson thought that “a judge independent of a king or executive alone is a good thing; but independence of the will of the nation is a solecism, at least in a republic government.”<sup>4</sup> The granting of long tenure of office to judges was felt to be undemocratic, establishing them as a privileged class.<sup>5</sup> All other officials were immediately responsible to the people; why should the judges be different? And so the judicial office was made elective in the states and remains so today in thirty-five of them.<sup>6</sup> This, it is said, is of the utmost importance to the administration of justice, and particularly, criminal justice.

The issue is not merely whether the executive or the electorate is the better qualified to select good judges—though that is clearly very important. The fundamental thing is that the elective judge usually enjoys only a relatively short term of office. No state has ever given tenure for life or during good behaviour to popularly

<sup>4</sup> *Works* (ed. Ford) vii, p. 192.

<sup>5</sup> W. S. Carpenter, *Judicial Tenure in the United States* (1918) 168.

<sup>6</sup> “The Selection and Tenure of Judges in England: a Standard for Comparison” (1953) 39 A.B.A.J. 279. “In the remaining thirteen states judges are appointed by the Governor usually with the consent of the legislature or of one house of the legislature; but in a few of these thirteen states, Missouri, for example, variations of the appointive method are used.”

elected judges, though in several states the term of office has been so lengthened as almost to achieve this. In Pennsylvania the term is twenty-one years, in Maryland fifteen and in New York fourteen.<sup>7</sup> But in the majority of states where the elective system prevails a judge who wishes to retain his office must be prepared to stand in a contested election at intervals of six, four, or even two years. This procedure, American commentators point out, is hardly calculated to encourage judicial independence and impartiality. When an attorney becomes a judge he must surrender his law practice. A practice, laboriously built over many years, may be dissipated almost overnight by elevation to the bench. A judge is likely to be a man of at least middle age, and may have a number of dependants. Such a man cannot be expected to regard with equanimity the possibility of the loss of the office, which is his livelihood. He must, inevitably, be tempted to behave on the bench in such a way as to ensure his re-election. When he has to deal with a case which has excited great public interest, or has important political implications, it must be difficult for him to forget that the way in which he decides the case may have a great effect on his own career.<sup>8</sup>

It seems that it is in his relationship with the press that the weakness of the position of the elective judge appears most clearly. The newspapers want a free hand to deal with a trial as a spectacle or a sporting event. The judge needs to keep his name before the public. "Each side," writes one commentator, "can supply precisely what the other demands and their co-operation has produced a shameless traffic whereby official information on judicial matters is exchanged for publicity."<sup>9</sup> The effect upon the

<sup>7</sup> Warren and Cabot: "Changes in the Administration of Criminal Justice during the Past Fifty Years" (1937) 50 *Harv.L.Rev.* 583, 604.

<sup>8</sup> Judge Lummus of the Supreme Judicial Court of Massachusetts writes: "A judge in office for a term of years who does not consider the coming election invites a martyr's crown—and many deem a martyr only a glorious sort of fool. Why, indeed, it may be asked, should a judge risk his livelihood for the sake of people who value impartial justice so little that they deliberately set him upon an unstable perch to be pushed and jostled by every individual and every group that can make claim to political power?" (*The Trial Judge*, 92.)

There is indeed evidence that some judges are influenced by the prospect of the forthcoming election. "A judge facing re-election has had to ensure his survival through one or several of the following ways: catering to petty bosses who control votes; patronising certain influential groups—racial, religious or industrial; general publicity in the newspapers or otherwise. Whichever way the premium is paid, the judge and his high office are degraded." *Criminal Justice in Cleveland*, 260.

<sup>9</sup> Stuart H. Perry, "Politics and Judicial Administration," *Journal of the American Judicature Society* (1934) xvii, 133.

According to *Criminal Justice in Cleveland* (p. 519): "The range of competition leads newspapers to go beyond the mere reporting of crime and of the efforts of law enforcement and drives them to scoring 'scoops' and 'beats.' As a result a personal relation is sought between the newspaper men and the officers of the law, with a view to facilitating opportunities for

elective judge, according to this writer, is that "At the best he is chary of offending a powerful, and sometimes an unscrupulous, newspaper. At the worst he eagerly uses the newspaper as his press agent."<sup>10</sup> This is, perhaps, one reason why the newspapers are liable to indulge with impunity in comment and speculation on pending cases which, in England, would be at once visited with condign punishment. It is not the only reason, for it is clear that the provisions in the United States Constitution relating to the freedom of the press prohibit committals for contempt in some cases where they would certainly occur in England.<sup>11</sup> But even this narrower law of contempt does not seem to be used to the full. In the opinion of one experienced lawyer:

"As the law stands today there is no important criminal case where the newspapers are not guilty of contempt day after day. All the lawyers know it, all the judges know it, and all the newspapers know it. But nothing is done about it. No new laws are necessary. The court has full jurisdiction to see that no one influences a verdict or a decision. But everyone is afraid to act."<sup>12</sup>

The theory underlying the elective system is, of course, that the judges are directly responsible to the people. But in fact the electorate are not in a position to assess the qualification of the various candidates for judicial office, and the judges tend to be

such 'scoops.' In turn a play for the favor of the newspapers is made by officials whose public or professional life depends not inconsiderably upon advertising. Eager for special opportunities, the reporters play favorites with police officials, judges and prosecutors. The barriers of impersonalness which should exist between law enforcers and the press are thus broken down. The result is a confusion of standards, and conscious or unconscious partiality and exploitation by the press."

<sup>10</sup> Stuart H. Perry, *op. cit.*

<sup>11</sup> Cf. Black J. in *Bridges v. California*, 314 U.S. 252; 86 L.Ed. 192; 62 S.Ct. 190 (1941) "... to assume that the English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" A committal will be valid only where the words used constitute "a clear and present danger to the fair administration of justice." Cf. *Pennekamp v. Florida*, 328 U.S. 331; 90 L.Ed. 1295; 66 S.Ct. 1029 (1946). *Craig v. Harney*, 331 U.S. 360; 91 L.Ed. 1546; 67 S.Ct. 1249 (1947). *Baltimore Radio Show v. Maryland*, 193 Md. 300 (1949).

<sup>12</sup> Clarence Darrow, quoted by Stuart H. Perry, "The Courts, the Press and the Public" (1932) 30 Mich.L.R. 288.

Some judges have gone to extraordinary lengths in order to attract publicity. A judge in Cleveland is reported to have said: "I have told newspaper men that if something is going on in the city and if somebody says something for which he doesn't want to be quoted, they can quote me as saying it." When asked on what grounds he had seen fit to give such an unusual authority, he said: "It doesn't matter what they say; it's all constructive." *Criminal Justice in Cleveland*, 555.



selected, not by the people, but by the leaders of the political parties in the states.<sup>13</sup>

On the morning after the election, it has been said, probably very few people could remember the names of the individuals for whom they voted for election to the bench. All that they know is that they have voted for the ticket of a certain party.<sup>14</sup> It may, then, be in the judge's interest to avoid displeasing not only the electorate, but also the leaders of the party which supports him.

Since he may be under such temptation to consider how his conduct will be received by the public, the press, and the political leaders, the American elective judge is, it is clear, in an extremely weak position as compared with the English High Court judge who is appointed for life and can be removed only as the result of an address by both Houses of Parliament. He is in a weak position even as compared with the comparatively humble English Justice of the Peace, who is also appointed for life (though he is removable by the Lord Chancellor).

As distrust of the judiciary was so strong among the American people they tended, naturally, to diminish the powers of the judge in favour of the jury, and of counsel for the parties. The jury represented the people, while the judge, in early days, was still associated with Royal power. Jefferson strikingly emphasised the importance which he attached to the position of the jury:

"Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them."<sup>15</sup>

When, to suspicion of the judges and fervent belief in the necessity for a powerful jury, there is added the fact that immediately after the Revolution nearly all the judges were laymen,<sup>16</sup> it is not surprising to find that the judge in early United States history was

<sup>13</sup> Cf. Hyde: "Judges: Their Selection and Tenure," *Journal of the American Judicature Society* (1947), xxx, 152: "It is an old saying that by looking at a frog one cannot tell how far he can jump. It is likewise true, although perhaps not as fully realised, that by seeing a man's picture on a telegraph pole voters cannot tell whether he possesses the three essential judicial qualities. Many voters have little more than this as a basis for their decisions on statewide judicial officers or even on local judicial officers in large cities."

The three essential judicial qualities, according to the writer, are personal integrity, judicial temperament and adequate legal training.

<sup>14</sup> Governor Alfred E. Smith, *The Citizen and his Government* (1935), 85.

<sup>15</sup> Quoted (1939) 52 Harv.L.Rev. 582.

<sup>16</sup> "Of the three justices in New Hampshire after independence, one was a clergyman and another a physician. A blacksmith sat on the highest court of Rhode Island, from 1814 to 1818, and a farmer was chief justice of that state from 1819 to 1826." Pound, *The Formative Era of American Law* (1938) 92.

not placed in a position of very great power. He was in fact deprived of almost all the powers which together constitute judicial status as we know it. The jury were charged with the duty of deciding all questions of fact *and law*: the judge held office, not for the purpose of deciding causes but merely to preserve order and to see that the parties were given a fair chance to put their case before the jury.<sup>17</sup> This was the adversary system carried to extremes which have never been seen in this country. The American jury has now surrendered its right to decide questions of law, but in taking this power away from the jury the states have not restored it to the judge in its common law fullness.<sup>18</sup> The English judge has not merely power to instruct the jury—orally—as to the law governing the crime charged, but he can relate the evidence in the case to the law which he expounds, and he can comment on the weight of the evidence. The Court of Criminal Appeal has laid down the limits of the trial judge's discretion in this matter as follows:

“A judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided he leaves the issues of fact to the jury to determine. A judge is obviously not justified in directing a jury, or in using in the course of his summing-up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions.”<sup>19</sup>

In about half of the states, on the other hand, written instructions only may be given; in twenty-two of the states the charge must be given before the counsel argue, so that the last words the jury hear come, not from the impartial judge, but from interested and perhaps impassioned counsel.<sup>20</sup> Most important of all, in the majority of states the judge may not comment on the evidence. He may express no opinion on the merits nor any views

<sup>17</sup> Howe, “Juries as Judges of Criminal Law” (1939), 52 Harv.L.Rev. 582.

<sup>18</sup> A considerable proportion of the politicians in the states are lawyers, and they have tended to oppose changes which would have resulted in an increase of judicial power at the expense of their own. “. . . the bar, instead of supporting the bench in its adherence to traditional procedure, became in a sense its rival and sought to transfer the conduct of trials from the hands of the judge into its own.” Perry, *Journal of the American Judicature Society* (1934), xvii, 133.

<sup>19</sup> *R. v. O'Donnell* (1917) 12 C.A.R. 219.

<sup>20</sup> L. B. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 452.

as to the weight or credibility of the testimony of any witness.<sup>21</sup> The jury are thereby deprived of the opinion of the only impartial expert present, and the result, it seems, is that the trial tends to become debased into a contest of skill between the opposing counsel. Many writers have pointed out that the result of this system is to degrade the position of the trial judge to that of a mere moderator, and there is a danger that, in consequence, he may not give to his work the attention it deserves. The Commonwealth Fund Committee on the Law of Evidence reported that it is no infrequent thing to see a trial judge busying himself with extraneous matters during the taking of evidence, so that when he is called on to rule on an objection, he is obliged to have the pertinent portions of the record read to him. One danger of this attitude is that it may lead the jury to think that the trial is merely a struggle between the attorneys, that the judge is not much interested in the outcome, and that, perhaps, it is not of much importance. The Committee felt that:

“Unjustifiable as this behaviour is, it should be recognised that there must be considerable temptation to a busy judge to use the time to clear up other work. Inasmuch as he is not to be concerned with the weight of evidence or the credibility of witnesses, all he needs is a stock charge for each class of case, and in some jurisdictions even so much is unnecessary. And to a lazy judge, the temptation to treat a jury trial as an intellectual vacation is almost irresistible. Indeed some judges go to the extent of spending their time in reading a newspaper, writing letters or chatting with friends.”<sup>22</sup>

Even in the federal courts and the states where comment is permitted the judge appears to have much less latitude than his English counterpart. According to Wigmore, “Since so many Federal judges were brought up under the newer State practice

<sup>21</sup> “It is of the highest importance in the administration of justice that the court should never invade the province of the jury, should give them no intimation of his opinion on the facts but should leave them wholly unbiased by any such intimation to ascertain the facts for themselves”: *People v. Ramirez*, 113 Cal.App. 2d, 842, 249 P. 2d, 307 (1952).

<sup>22</sup> *The Law of Evidence, Some Proposals for its Reform* (1927) 11.

In a recent case in Oklahoma it appeared that the judge adopted the curious practice of leaving the bench at the close of the evidence and making himself inconspicuous during closing arguments in order to impress upon the jury the importance of their responsibility from that point on. On the occasion in question the judge retired to his office 40 feet away, where he could not at all times see or hear what was taking place. Several wrangles occurred between the attorneys and the judge had to be sent for to rule on objections. An appellate court held that the judge had gone too far in this instance, and had lost control of the trial, so that the conviction must be quashed and a new trial ordered. *Ridenour v. State*, 231 P. 2d, 395 (Okla.Crim.App. 1951).



there has appeared in some Federal Courts a tendency to retrograde from sound standards and to limit the trial judge overstrictly in his exercise of this power.”<sup>23</sup> Judge Wyzanski of the Massachusetts bench believes that “No federal judge would be likely to give as detailed, as long, or as leading a charge as, say, Lord Wright’s admirable summing-up in the *Royal Mail* case or Lord Chief Justice Goddard’s summing-up in the *Laski* libel action.”<sup>24</sup>

It is clear enough, then, that the American judge in the majority of states has a much less important role in the trial than the English, and it is the general view of the American commentators that the limitations on the power of the American judge are unfortunate.<sup>25</sup> Of course there are those on both sides of the Atlantic who think that our English judges go too far in the force with which they express their views to the jury. Serjeant Sullivan, who has great experience of criminal courts in both England and Ireland, is one of these. In his memoirs he expresses his preference for the American practice of excluding judicial comment altogether. His view is that:

“It is no concern of a judge whether a man be convicted or acquitted. With the standard of duty everywhere evidenced by the British juror, I have no hesitation in saying that he is far more likely to arrive at a true conclusion of fact left to his own judgment than when he is influenced by exhortations from the Bench. I once gave some offence to one of my judicial friends at the Old Bailey when I suggested to the registrar of the court that he should ask the foreman of the jury, did they find for his Lordship or against him? But in truth that is the issue left to the jury when the judge takes sides for the prosecution. Either the jury must do as the judge has implored or they must slap him in the face, and they are deprived of moral freedom to exercise their unfettered judgment when doing so might involve a slight upon a judicial officer.”<sup>26</sup>

<sup>23</sup> *Treatise on Evidence* (3rd ed., 1940). s. 2551.

<sup>24</sup> 65 Harv.L.Rev. 1281, 1283 (1952).

<sup>25</sup> Wigmore characterised the withdrawing of judicial power to comment on the evidence as “an act of intemperate folly”: *Treatise on Evidence*, s. 2551, n. 5. Dean L. Green believes that it is that power “which has given trial by jury its chief, if not its only, dependability”: *Judge and Jury*, 402.

<sup>26</sup> *The Last Serjeant* (1952), 288.

An interesting contrast is Judge Jerome Frank’s opinion that the judge’s instruction is merely part of “an elaborate ceremonial routine” which has no effect whatever on the jury’s verdict. “. . . everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury’s understanding of them, they are spoken in a foreign language.” *Law and the Modern Mind* (1948), 181.

Cf. the comment of Judge Lummus: “If the view that instructions are futile has reference only to the debased forms of jury trial that prevail in some states, by which the judge must instruct the jury before counsel argue and is

The extent of the learned Serjeant's experience of the American practice does not appear in his book. It must, however, be very small compared with the weight of American experience which condemns the rule forbidding comment. Most of those who have examined the problem, and all of the various "Crime Surveys,"<sup>27</sup> seem to be agreed that the power to comment should be restored. Serjeant Sullivan is, no doubt, right when he says that judges are sometimes too emphatic in expressing to the jury their own opinions on the facts, but it may be doubted whether that is a good reason for prohibiting comment entirely. Indeed, that great criminal judge, Sir James Stephen, thought it impossible for a judge to conceal his opinion from a jury if he merely arranged the evidence in the order in which it struck his mind:

"The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other must of necessity point to a conclusion. The act of stating to the jury the questions which they have to answer and of stating the evidence bearing on those questions and showing in what respects it is important generally goes a considerable way towards suggesting an answer to them, and if a judge does not do as much at least as this he does almost nothing."<sup>28</sup>

The right of appeal to the Court of Criminal Appeal is a safeguard against abuse, and it is acknowledged that that court has done much to raise the standard of summing up in the trial courts.<sup>29</sup> It has been laid down that it is the duty of the judge to put the case for the defence fairly and as carefully as that of the prosecution<sup>30</sup>; the jury must be told that the onus of proof is on the Crown throughout, and that they must not convict unless they are satisfied of the accused's guilt beyond a reasonable doubt.<sup>31</sup> In short, the judge should, as Bacon says, "be a light to jurors to open their eyes, not a guide to lead them by the noses."<sup>32</sup>

denied the last word; or worse, may instruct them only by a written essay; or worse still, is confined to affirming or denying such propositions of law as counsel choose to draft and present, leaving counsel in effect to charge the jury in the name of the judge through the skilful use of such propositions drafted by partisans, to which the judge has been compelled to yield assent; then I am inclined to agree that instructions are futile. The very purpose of such practices is to reduce the trial judge to impotence, and make the trial a duel between counsel." (*The Trial Judge*, 28.)

<sup>27</sup> Orfield, *op. cit.* 458.

<sup>28</sup> *History of the Criminal Law* (1882), i, 455.

<sup>29</sup> Cf. Seaborne Davies, "The Court of Criminal Appeal The First Forty Years," *Journal of the S. P. T. L.* (1951), 425, 430.

<sup>30</sup> *R. v. Totty* (1914) 10 C.A.R. 78; *R. v. Immer* (1917) 13 C.A.R. 22; *R. v. Keating* (1909) 2 C.A.R. 61.

<sup>31</sup> *Woolmington v. D. P. P.* [1935] A.C. 462.

<sup>32</sup> Campbell, *Lives of the Chancellors*, II, 428.

## THE JURY

As the power of the judge in America is limited, so the burden on the jury is increased. "With few exceptions, practically every change in trial procedure in America during the nineteenth century meant more and more domination by the jury and less and less control by the trial judge."<sup>33</sup> The jurymen in many states are required to decide whether a prisoner be guilty or not on the basis of an abstract statement of the law unrelated to the facts. They hear no impartial comment on the evidence, but only the views of opposing counsel between which they must attempt to choose with no independent assistance whatever. Whether any jury is equal to such a task is doubtful, and American commentators do not lead one to suppose that their juries are exceptionally competent. The jury is supposed to be a cross-section of the community but, according to the National Commission on Law Enforcement, in some of the states the legislature has, by statute, granted exemption from liability to jury service to so many classes and categories of people as to remove from the jury roll the best qualified citizens. The body from which juries are selected is often reduced to the least intelligent, experienced and competent part of the community. Then, it is said, many of those who are liable to jury service make every effort to be excused—and the worst offenders are those who are best qualified. The National Commission reported that:

"When elected judges, frequently holding office for relatively short terms, are subjected to this pressure, often reinforced by political influence, it cannot be expected that a high standard of competent juries may be maintained."<sup>34</sup>

It is said to be undeniable that in many states the better educated persons in the community are successful in avoiding jury service.<sup>35</sup> When the panel has been summoned the process of elimination of the superior elements is not yet necessarily complete. For—in most states—counsel for both sides now have the opportunity to examine in court each jurymen as to his history, his state of mind and his mental reactions, in order to decide whether to challenge him.<sup>36</sup> In some jurisdictions the power to ask questions on the *voir dire* is almost unlimited. It is not unusual for one or two days to be consumed in this process, and in

<sup>33</sup> Green, *Judge and Jury*, 380.

<sup>34</sup> Report on Criminal Procedure, 26.

<sup>35</sup> R. Moley, *Our Criminal Courts* (1930), 109.

<sup>36</sup> G. H. Dession, *Criminal Law, Administration and Public Order* (1948), 966, quotes a suggested sequence of questioning jurors by the defence, which consists of thirty-two questions.



exceptional cases it has taken weeks.<sup>37</sup> The questions which counsel ask are often directed to obtaining, not impartial, but favourable jurors.<sup>38</sup> "This wasteful proceeding," according to the National Commission, "does not result in better juries . . . Indeed, on the whole, it results in weak and ignorant juries where strong and intelligent juries are most required."<sup>39</sup>

Under English law the accused may make seven "peremptory" challenges, and both the Crown and the accused may challenge an indefinite number of jurors "for cause"; but counsel have no right to examine the panel in court to decide whether to do so. The accused can, if he wishes, obtain for a shilling the names of the panel in advance of the trial in order to make inquiries about them with a view to challenge. But the right is very rarely exercised in English courts, and challenges are almost unknown.<sup>40</sup> There are, no doubt, many reasons why challenge is so important in America and so unimportant in England, notably the heterogeneous nature of the American population; but the National Commission put their finger on another most important factor when they said that "Undoubtedly the power of their judges to guide juries toward an intelligent weighing of the evidence makes it possible for the British courts to dispense with the preliminary examination by which American lawyers set so much store."<sup>41</sup>

It is not surprising that there is a good deal of dissatisfaction with criminal juries in the states.<sup>42</sup> Yet the jury, in almost all the states, has much greater power and a more difficult task to

<sup>37</sup> "In one Chicago case, 1,350 jurymen were summoned and 646 examined before 12 were selected. In a San Francisco case a few years ago it took ninety days to choose the jury. . . . Such scandals . . . are largely due to weak judges and to their lack of authority themselves to examine and qualify the jurors."

S. Glueck, *Crime and Justice* (1936), 86.

<sup>38</sup> Green, *op. cit.*, 396.

<sup>39</sup> Report on Criminal Procedure, 26.

Where challenges are exercised on a large scale the natural tendency appears to be to eliminate the stronger elements. Kenny tells us that "Maitre Lachaud, that most successful defender of prisoners in France, made it his rule 'I challenge every man that looks intelligent.' In Ireland a kindred rule was at one time current: 'Challenge every juror who wears a necktie.'" *Outlines of Criminal Law* (16th ed., 1952), 503.

Cf. Sir Travers Humphreys, *Criminal Days* (1946), 224: ". . . in the Case-moment trial the defence freely availed themselves of the right, with the object, so far as I could judge, of getting rid of the most respectable looking of the persons summoned."

Even if it is not the conscious aim of counsel to eliminate the better-educated jurymen, yet, says Dean Green, "the intelligent juror caught on the panel discovers quickly how to disqualify himself." *Judge and Jury*, 396.

<sup>40</sup> According to Sir Travers Humphreys, the exercise of the right of challenge "is quite unnecessary, since the Clerk of the Court will always replace any juror to whom either side objects, by another juror chosen in the same way. . . ." *Criminal Days*, 224.

<sup>41</sup> Report on Criminal Procedure, 26.

<sup>42</sup> Cf. Richard B. Morris, *Fair Trial* (1953), 8. "In those states where waiver of jury trial is permitted, the accused eagerly grasp the opportunity of not being tried by their peers."

perform than its English counterpart. In many states the assessment of punishment in certain classes of case is left to the jury. American commentators find little to say in favour of this practice. An inexperienced jury, sitting perhaps for one case only, cannot possibly have any standards in such a matter, and is likely to be influenced by quite irrelevant considerations.

“A study some years ago of the assessment of punishment in homicide cases showed that the picturesque murder, however heinous, was visited with imprisonment, while murders, no more heinous, but lacking in the picturesque element, were visited as a rule with the death penalty.”<sup>43</sup>

American experiments with the jury seem to have resulted in the conclusion that the jury ought to be confined to those functions which it has customarily performed in England and continues to perform at the present day. Thus the National Commission found it “significant that there is most satisfaction with criminal juries in those jurisdictions which have interfered least with the conception of a trial of the facts by jurors unburdened with further responsibility and instructed as to the law and advised as to the facts by the judge.”<sup>44</sup>

#### THE PROSECUTOR

On turning to the status of the prosecutor we find an even more striking contrast with the position in England. We still adhere to the ancient system of private prosecution under which any person can bring a prosecution for any crime—subject to a number of statutory exceptions—whether he has been injured thereby or not. In America, on the other hand, private prosecution has long been entirely superseded. In the first years of the eighteenth century the colonies began to appoint public prosecutors—perhaps because of the shortage of trained lawyers—and by the end of the century this was firmly established as the American system. The general features of state prosecuting arrangements are fairly uniform.<sup>45</sup> Each state has an attorney-general and there is a local prosecutor in each county and in each city. The attorney-general usually has no control whatever over these local prosecutors—and there are

<sup>43</sup> Report on Criminal Procedure, 28.

<sup>44</sup> *Ibid.*

<sup>45</sup> Unlike English arrangements. An American observer comments: “An American efficiency expert would doubtless be appalled at the lack of a uniform method of conducting prosecutions and would immediately set out to tinker with the existing arrangements. The Englishman does nothing of the sort, because, despite an occasional scandal, the system seems somehow to work, and he is not greatly interested in learning how it works or why it works. At all events he grows melancholy at the thought of changing it. The pragmatic test is for him sufficient.” P. Howard, *Criminal Justice in England* (1931), 93.

some three thousand counties in the United States, so it can be seen that prosecution is essentially a local business. The prosecutor is elective for short terms—of two to four years usually—and is responsible—theoretically—only to the local electorate. The only qualifications for office are that the candidate should be of voting age and a lawyer. The office is seldom regarded as a career, but merely as a stepping-stone to a higher office. Yet the local prosecutor is in a position of enormous power. He has, in substance, the powers of an attorney-general in his own district. But his powers are very much wider than those of an attorney-general as that office is understood in England. He exercises four quite different functions, namely, that of a criminal investigator together with the sheriff or police in gathering evidence; in substance, that of a magistrate in determining who shall be prosecuted and who brought to trial and who not; that of a solicitor in preparing cases for trial; and that of an advocate in presenting the prosecution's case in court and arguing appeals.<sup>46</sup>

A source of great power to the local prosecutor is his discretion to commence or discontinue proceedings as he sees fit. In England the Crown has the power to enter a *nolle prosequi*, a declaration that the Crown is unwilling that the prosecution shall go forward, which automatically terminates the proceedings. This power can be exercised only by the Attorney-General, and is very rarely used. In America this power is exercised, not by the attorney-general of the state, but by the local prosecutor, and is very frequently used. Through the *nolle prosequi* the prosecutor exercises what has been described as a royal dispensing power.<sup>47</sup> In most jurisdictions the number of prosecutions which are begun each year is so large as greatly to exceed the capacity of the courts to try them, and the local prosecutor can use this device to select those to be tried. It is he who decides what laws shall be enforced and against whom.

In some states statute requires reasons for the entry of a *nolle* to be put on file, while in others, statute or long judicial practice requires the leave of the court to be obtained. "But," according to the National Commission, "in practice with the crowded dockets of the modern city these checks have been applied perfunctorily and are achieving little or nothing."<sup>48</sup>

In most states prosecutions are still commenced by indictment by a grand jury. But, under modern conditions, the grand jury can indict few criminals of their own knowledge and their deliberations are therefore usually circumscribed by the evidence which

<sup>46</sup> National Commission, Report on Prosecution, 12.

<sup>47</sup> *Ibid.*, 27.

<sup>48</sup> *Ibid.*, 20.



the prosecutor chooses to put before them. And, by the way in which he handles this evidence, he can in most cases obtain an indictment or not as he chooses. The grand jury, it is commonly said, has been reduced to little more than a rubber stamp for the local prosecutor.<sup>49</sup>

This officer, then, occupies a position comparable to none in England. It is difficult to overestimate his influence. Sometimes magistrates will not, without his approval, even issue a warrant for arrest. Sometimes he announces that he will not enforce a particular law and he is in a position to put this decision into effect. Yet the official who has this enormous power is responsible to no one except the local electorate—and they are not in a position to judge of his efficiency or otherwise. The consequence, according to Judge Lummus, is that:

“The average elective prosecutor seeks sensational publicity as avidly as a movie star. The quiet, sincere, efficient performance of duty would soon leave him a forgotten man among the voters, and a well-hated one in political circles.”<sup>50</sup>

In England the lawyers in charge of criminal prosecutions are not, in general, professional prosecutors. Indeed it is common to see the same counsel appear in one case for the prosecution and in another for the defence at the same assize. This practice, it is suggested, is beneficial in enabling the prosecuting counsel to fulfil that difficult role which the common law prescribes for him—that of a minister of justice whose duty it is to see that all the relevant evidence is before the court—whether it be in favour of the prosecution or against it—rather than that of the partisan advocate whose sole object is to put his client's case in the best possible light.<sup>51</sup> This is not an easy role to fulfil under any circumstances, but the difficulty is, surely, greatly increased where the counsel is a professional prosecutor who may consider himself engaged in a war against crime<sup>52</sup> and whose re-election to office may depend on the success which he obtains in court. Whether or not this is the reason, it seems that startling examples of failure to comply with

<sup>49</sup> Raymond Moley, “Criminal Law Administration,” *Political Science Quarterly*, XLII, 497, 508; Richard B. Morris, *Fair Trial*, 8.

<sup>50</sup> *The Trial Judge*, 75.

<sup>51</sup> Cf. The Canons of Professional Ethics of the American Bar Association, 5: “The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.”

<sup>52</sup> Cf. “Misconduct in the Prosecution of a Criminal Case” (1954), 54 *Columbia L.Rev.* 946, 948.

the common law standard occur from time to time in America.<sup>53</sup> It is suggested that the independence of prosecuting counsel is almost as important as that of the judge, and it is certainly not achieved when he is elected for a short term. For the office is regarded as a great political prize, and can be acquired only with political backing. The system necessarily involves a risk that a prosecutor may find that his election carries with it certain obligations to political leaders, whom he must not antagonise if he desires re-election, or a future in politics. According to Judge Lummus:

“No measure within the immediate control of the people, unless possibly the proper organisation and training of the police and their removal from political control, would help the cause of impartial justice so much as making prosecutors appointive by some authority not immersed in local politics.”<sup>54</sup>

#### DEFENCE COUNSEL

It appears to be an unfortunate fact that undertaking the defence of criminal cases is no longer entirely respectable in America, at least as an habitual occupation. Most lawyers of standing dislike and avoid practice in the criminal courts.<sup>55</sup> Various reasons for this have been given by the lawyers themselves: that it is unremunerative as compared with civil practice; that it involves association with an undesirable element in the profession and so gives a bad reputation which injures civil practice; and that it is so technical as to require specialisation which, from an economic standpoint, is not worth while. “As a result the criminal courts in our cities are largely without proper assistance from competent and well-educated prosecutors and defenders.”<sup>56</sup> Those who

<sup>53</sup> In the notorious *Hauptmann* case the prosecuting counsel in his closing speech referred to the accused as “That animal, that desperate character, burglar, murderer, Hauptmann,” and declared, “I am not concerned about what the mob is clamouring for, as counsel refers to it, but you can bet your life if there is a clamour from the people of this country for this man’s conviction I have sufficient faith in the American people to know that it is their honest belief and conviction that he is a murderer.” Cf. A. H. Robbins, “The Hauptmann Trial in the Light of English Criminal Procedure” (1935) 21 A.B.A.J. 301.

In a Texas case (*Hazzard v. The State*, 111 Tex Cr. 539, 15 S.W. 2d 638 (1929)) the prosecutor told the jury, “The eyes of Comanche county are upon you. Look at the crowd in this courtroom, and a crowd has been here all during this trial. The will and wish of every law-abiding citizen of Comanche county wants a verdict of death.” The desired verdict was given and reversed.

<sup>54</sup> *The Trial Judge*, 76.

<sup>55</sup> “The so-called ‘better-class’ lawyer . . . prides himself on his lack of knowledge of criminal laws and of conditions which prevail in the criminal courts.” Justin Miller, “Lawyers and the Administration of Criminal Justice” (1934) 20 A.B.A.J. 77.

<sup>56</sup> The National Commission, Report on Prosecution, 27.

practise in the criminal courts tend to be less well trained than their fellows in the civil courts. In Cleveland it was found that the students from the night schools, who went out to practise in the criminal courts, had given one third as much time to criminal law as was required in the three university law schools in the state, from those who were to practise chiefly on the civil side.

It seems, indeed, that there may be little encouragement for a good lawyer to engage in criminal practice. According to one writer, the guilty defendant—and presumably most defendants are guilty—does not seek a lawyer for his legal or forensic ability; it is the man “who knows the boys” who can do much more for him. “The ordinary criminal case is a mere ‘dickering’ job—dickering with the district attorney to get a ‘light rap’ (or sentence) for his client by ‘taking a plea.’”<sup>57</sup>

The practice of the criminal law in America is always closely related to politics, and the “habitual defenders” are usually men of political influence. Local prosecutors are, as we have seen, sensitive to such influence, and one of these politician lawyers is the most likely man to procure the entry of a *nolle prosequi* or to get a light sentence for a guilty man. Some of these lawyers have not confined themselves to legitimate action. According to an Attorney-General of the United States “a startlingly large number of lawyers have not only misconceived their duties as advocates, but have, in effect, actually participated in criminal activities.” He instanced procuring the commission of perjury, attempting to influence a witness, juror, or officer of the court, and similar crimes.<sup>58</sup>

One reason for the state of the American criminal bar is, perhaps, the economic one: that the financial rewards of civil practice are likely to be much greater than those of criminal work. Persons accused of crime are usually poor, whereas those who indulge in civil litigation are, on the whole, much better off. The young lawyer who can obtain employment at a good salary in a law firm or corporation is not, naturally, going to embark on a hazardous career at the criminal bar.<sup>59</sup> Consequently the most able of the nation’s young lawyers avoid criminal practice, which has fallen into the hands of men of less worth. The economic

<sup>57</sup> Moley, *Our Criminal Courts*, 63.

<sup>58</sup> Homer S. Cummings, “The Lawyer Criminal” (1934) 20 A.B.A.J. 82.

<sup>59</sup> Cf. Llewellyn, “The Bar Specialises—With What Results?” (1933) 167 *Annals*, 177. “Outside of defending bank directors or opposing extradition of utility magnates, what contact with the criminal law do even the few litigation experts of the high-class office have? . . . The professional crook seeks out the professional criminal lawyer. . . .

“As for the accused who is no professional crook, especially if he is thin of pocket, he is permitted to fit into the scheme built up for the professional.”



explanation, however, is obviously not the whole story; for the same situation has not arisen in England, where criminal clients are equally poor, and the lawyer is just as concerned with making money as his American brother. Two reasons are suggested for this: first the division of the profession in England into solicitors and barristers; and secondly, the control exercised over the two branches of the profession by the Law Society and the Inns of Court respectively.

The young barrister who wishes to practise at the bar cannot join a law firm at a salary; barristers are not permitted to form partnerships or companies. He must set out on his own, getting what briefs he can. The majority of cases which are likely to come the way of a young man at the common law bar early in his career are criminal ones. The best young barristers therefore compete for criminal briefs which not only bring in some badly-needed money, but also help the young man to make a reputation. The division of the profession, then, ensures that good men become familiar with criminal practice at the bar. The strong professional tradition fostered and enforced by the Inns of Court ensures that their behaviour in practice will be of a high standard. Success does not mean abandonment of criminal practice—indeed it is a convention that a barrister should not refuse a brief for the defence if he can possibly take it—with the result that many of the leaders of the common law bar are just as much at home in criminal cases as in civil litigation.

In America the profession is not divided; all lawyers are attorneys; and “in this merged profession of the law the lower rather than the higher branch of the English profession was taken as the model.”<sup>60</sup> Economic and social conditions in the last century required decentralisation, and led to a system of local bars, in which the professional traditions, inherited from England, were gradually lost, and have proved difficult to regain. Bar Associations, except in a few states, are voluntary organisations, and have little or no influence over the habitual practitioner in criminal cases.<sup>61</sup>

In the opinion of Dean Pound, “when we remember that the Anglo-American contentious procedure presupposes counsel as aids to the court, this turning of practice in criminal cases to

<sup>60</sup> Pound, *Criminal Justice in America* (1930), 157.

<sup>61</sup> The National Commission (Report on Prosecution, 29) reported that, “It must be emphasised that, but for a few jurisdictions where the whole body of practitioners has been incorporated, there is, in substance, no responsible profession of the law. There are only in each locality of importance so many hundred or thousand individual lawyers, each following a money-making calling as he pleases, with little check beyond his own conscience.”

unorganised, undisciplined, deprofessionalised, individual money-makers must be recognised as not the least factor in the conditions (in American criminal law) of which we complain today.”<sup>62</sup> “Courts are made and shaped more by the character of the bar before them than by any other single factor. Courts, over the long haul, tend in their standards and in their performance to fit the character of the bar with whom they deal.”<sup>63</sup>

#### THE LAW STUDENT

This brief review of the men of the criminal law would not be complete without a word about the criminal lawyers of tomorrow: the students in the law schools. The American law school is a professional school, aiming to turn out a finished lawyer ready to go straight into a firm and able to take an active part in its business at once. The training is very largely vocational and subjects like Roman law usually have no place in it, and Jurisprudence a very small one. Such subjects have little direct value in a law office, the students therefore do not want them, and the law school tries to give the students what they want. Consequently the place of criminal law is not a large one. It does not seem to be considered an important subject like, for example, Taxation or Corporation law, which are the subjects through which a large number of students hope to earn their living when they begin to practise. In one of the great law schools in 1952 one of the lecturers in criminal law described it as the “Cinderella” of subjects in that law school; while another found it necessary to justify its inclusion in the syllabus—as lecturers in Roman law sometimes do in an English law school. This is regrettable but it is the inevitable result of conditions at the American criminal bar. To quote Dean Pound:

“In their neglect of the criminal law our law schools but reflect the demands of students and the attitude of the legal profession. Students press for the subjects with which they expect to be concerned in their professional life. No ambitious young student in a national law school of today seeks to prepare himself to practise in criminal causes. He knows well that habitual appearance in such causes is the business of a type of politician lawyer of little standing at the bar or of the lower stratum of the profession. Hence he seeks no more than that minimum knowledge of criminal law which is required by examiners for admission to the bar. I am told that in

<sup>62</sup> Pound, *Criminal Justice in America* (1930), 159.

<sup>63</sup> Llewellyn, *op. cit.*

answer to a questionnaire as to proposed changes in the curriculum sent out recently by a faculty of law, a large proportion of students gravely proposed that criminal law be left out of the list of required subjects. They said they did not intend to practise in criminal cases so why require them to waste their time and energy on criminal law? ”<sup>64</sup>

It is not suggested that the factor of personnel is the only reason for the differing measure of satisfaction with the common law method of administering criminal justice in England and America respectively. But it seems clear that this factor is regarded by informed American critics as at least an important contributory cause of their difficulties; and that their criticisms in this field have, in general, no application in England. Nor is it suggested that English complacency with the administration of criminal law is justified. It may well be that we have much to learn from American procedure. Many would no doubt agree that—for example—it is superior to the English in that, in many states, it requires the accused to disclose the nature of his defence in advance of trial; and in the power of appeal courts to order a new trial in appropriate cases. But in the matter of personnel and their powers, American criminal justice seems to be under a considerable handicap; and it is hoped that this article may be of assistance in enabling English lawyers better to understand American difficulties in this respect.

### POSTSCRIPT

By the Vice-Dean of the Harvard Law School

MR. SMITH, after nearly a year in the United States studying our methods of administering criminal justice, has recognised that generalisation about it “is necessarily dangerous.”<sup>1</sup> For English readers who may not be familiar at first hand with the decentralisation of American judicial machinery, this recognition should particularly be borne in mind in appraising some of the extreme examples of judicial impropriety with which he has enlivened his article. Otherwise these few examples, culled from the reports of forty-eight states and a thousand courts, from surveys in single cities in past decades, and from a study twenty-five years ago of our disastrous experiment in national prohibition, would prove as misleading as the average American gangster movie. It is never safe to assume that such examples are typical ones, and as each

<sup>64</sup> “Towards a Better Criminal Law” (1935) 21 A.B.A.J. 499.

<sup>1</sup> *Supra*, p. 81.



instance has been exposed, its exposure has usually led to corrective action.

But as Mr. Smith has also pointed out, there are "enough characteristics common to all the states" to serve as the basis of his comparative study.<sup>2</sup> The conclusions he has drawn from his analysis of the historical development and present rules governing the method of selection of and the distribution of powers among the personnel involved in the administration of criminal justice in England and in America are stimulating and provocative. The quality of available personnel has affected the distribution of authority in government generally, as in other types of administration. It is important to trace this out in the more limited field of criminal justice.

I commend this article to both its English and its American readers. *The Cambridge Law Journal* has performed a public service to both countries in its publication.

To English readers, it should serve to illuminate some of the problems which must be faced in a federal state of large area, confronted with a highly mobile population. These conditions have led us to establish the office of Prosecuting Attorney, with powers and duties not found in any single English official.

I hope American readers will get a fresh look at their own situation through the eyes of a skilled observer from abroad. We have never suffered from a lack of self-criticism in our own country, but sometimes the best methods of alleviating clearly perceived difficulties may come from outside suggestions. A comparative study such as this should prove helpful.

Just how far I may personally agree with Mr. Smith's suggestions seems irrelevant here. I do agree with many of them, including his preference for an appointed judiciary. But in this connection I rather think he may have over-emphasised the effect which standing for re-election has upon the independence of non-appointed judges in the United States. In fact, a 1949 study showed that in about four-fifths of the states in which the judges are elected, a judge once elected is customarily re-elected.<sup>3</sup>

However this may be, it still remains true that our newspapers are given a freedom in comment and criticism on pending cases which goes beyond the English limits. I think we may well go too far here, but the effects may not be as bad as it is easy to suppose. And the more restrictive rule in England may not give full recognition to legitimate interests in freedom of the Press.

LIVINGSTON HALL.

<sup>2</sup> *Ibid.*

<sup>3</sup> Vanderbilt, *Minimum Standards of Judicial Administration*, 20-21.

## THE PERFECTING OF ORDERS IN CHANCERY

AN HISTORICAL BACKGROUND TO *RE HARRISON*<sup>1</sup>

MICHAEL BIRKS \*

FROM the standpoint of jurisprudence the judgment of any court should be perfected immediately after the judge has pronounced his decision. Unfortunately this ideal is not easily attainable in practice, and least of all in a court of equity. In the Chancery Division of the High Court the elaborate procedure built up by the old Court of Chancery for perfecting orders still remains virtually unchanged; and so far as the reported cases go the court had never been required until the recent case of *Re Harrison*,<sup>1</sup> to decide at what moment in time its decision becomes irrevocable. Put very shortly the point at issue in this case was whether a judge of the Chancery Division has power of his own motion to alter or reverse (before the judgment has been entered) an oral and decisive judgment given in open court.

Before dealing with the circumstances which gave rise to this question it will be as well to sketch very briefly the procedure which is followed in the Chancery Division for perfecting the court's order. The registrar in court takes down a minute of the order in his court book (formerly called a term book). The party having the carriage of the order, usually the successful party, now has to bespeak the order and bring in to the registrar's office counsel's briefs and any other relevant documents. The order is drafted by the registrar's clerk and copies are delivered to the parties who then attend before the registrar to settle the order. The registrar has power to permit variations in the draft by consent if he knows that they would be sanctioned by the court, and any party who is dissatisfied with the draft can apply to the judge who tried the action. When the draft has been settled it is engrossed. After the engrossment has been examined by the parties and stamped, they attend once more before the registrar to pass the order. An order is said to be passed when the registrar has inserted his initials at the foot of the last page. Formerly orders used to be entered by copying the completed order into the Decree and Order Book, whereupon the original was handed to the applicant. Nowadays

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<sup>1</sup> [1954] 3 W.L.R. 156 (Roxburgh J.); [1955] 1 W.L.R. 256 (C.A.).

the originals are filed in books kept for that purpose and the applicant is entitled to a sealed duplicate free of charge. Until 1876 all decrees were, according to the rules of the Court of Chancery, required to be enrolled. This involved the preparation of a docquet, which was in effect little more than a copy of the order, and which was sent to the Lord Chancellor for signature. The docquet was then taken to the Public Record Office where the order was copied on rolls of parchment. In practice enrolment was extremely rare, but I shall have more to say on this point later.

Now, in *Re Harrison*<sup>1</sup> application had been made to the judge to sanction a scheme for remodelling a settlement with a view to reducing liability for future death duties. The application was made necessary by reason of the fact that infants and unborn children were affected though it was agreed that the scheme was for their benefit. At the time of the application an appeal was pending in the House of Lords in the case of *Re Chapman*<sup>2</sup> wherein the jurisdiction of the court to approve schemes of this nature was being disputed. In these circumstances Roxburgh J. was reluctant to proceed with *Re Harrison*, but for reasons which need not concern us here, he felt compelled to do so. Accordingly the scheme was approved, but before the order had been passed and entered, judgment was given in *Re Chapman* and the House of Lords held that the court had no jurisdiction in such cases. Roxburgh J. thereupon stayed his order and adjourned the proceedings into court to hear argument why the order should not be revoked. Finally the learned judge decided that he did have power to recall an order before it had been perfected and this decision was later confirmed by the Court of Appeal.

At first sight it may seem curious that the earliest authorities cited in *Re Harrison* which had any direct bearing on the matter were all decided after the passing of the Judicature Act, 1873. Now the most probable explanation for this lack of authority is simply that before this Act came into force no one would have seriously suggested that a judge of the Court of Chancery had not sufficient control over a case to enable him to recall his order before it had been entered by the registrar. The former practice of the Court of Chancery is pertinent to this problem for if the Rules of the Supreme Court are silent on a point of procedure the rules and customs of the old court may continue to be followed. So in this article I propose to examine the development of the functions of the registrar in relation to the procedure for perfecting final Chancery decrees.

<sup>2</sup> [1954] 2 W.L.R. 723.



## THE REGISTER

It is not possible to fix with any certainty, the date at which the office of register began. (I should mention here that the name was changed to registrar in the nineteenth century.) There is no mention of such a person in the Ordinances concerning the officials of the Chancery and their duties made in 1388-89. The first reference to the office occurs in the *Renovacio Ordinum*<sup>3</sup> attributed to the time of Henry V. However, the way in which the provisions of the latter Ordinances are framed points to the possibility that the office was then in existence. The relevant paragraphs are those numbered 11-15 and they can be shortly summarised as follows.

Paragraph 11 provided that there were to be two "Notarii sive Tabelliones" to record "omnia acta et actitata . . . per Dominum Cancellarium decreta." One was to be in attendance upon the Chancellor and the other in attendance upon the Master of the Rolls, "so that Litigants may with little trouble learn the position and condition of their business." Under the following paragraph they were required to be in the Chancery at Westminster or wherever else the court was sitting by eight o'clock in the morning for the purpose of recording the proceedings. The next paragraph provided that before the hearing of all actions they were to first record the names of the parties and their attorneys, and the dates upon which bills, answers and other pleadings had been filed. And all attorneys were warned that as soon as they received such pleadings they were to bring them into the registry. It was next provided that the books of these "Notarii" were to be signed by the Chancellor or the Keeper of the Great Seal at each session. Finally they were to bring in their books every day before the court sat so that any ambiguities or omissions in the entries could be considered and corrected.

Thus it appears that the two Notarii were at this period merely clerks employed to keep a record of the judicial proceedings in the Chancery. The existing staff were evidently having a hard task in keeping track of all that was going on owing to the increasing volume of this work. I think it is probable that the role of these clerks was primarily to record the course of the proceedings rather than the results. Moreover it is possible, as I shall indicate, that the register, as he was called as early as 1434, was not originally required to take down the nature of the relief granted by the Chancellor.

<sup>3</sup> *Sanders Orders*, p. 7c.

Unfortunately the early registers' books have not survived and the series of Decree and Order Books at the Public Record Office begins in the year 1544. A clue as to the fate of the earlier books is given in a Presentment of Fees, etc., in the Court of Chancery of 1597 where it is stated "that no Register's bookes since the erection of that office have been brought into this Courte to remayne there accordingly, but contrariwise have been geven and solde at the pleasure of the Register for the tyme being." However it is apparent from the earliest of the surviving books that the registers' functions cannot have altered a great deal since they were first appointed. Until 1548 there were still two registers (though they may have had deputies or clerks), but in that year one Ralph Standyshe, gentleman, was granted the office "with all advantages enjoyed by Anthony Skenner and Nicholas Elyott or by the said Anthony Skenner and John Adams."<sup>4</sup> Thereafter there was only one register until the nineteenth century, and by the end of the sixteenth century he was carrying out his duties entirely through deputies.

There is only one indication that some change in the register's duties had taken place by the time the Decree and Order Books begin. Most of the entries deal with interlocutory matters; orders to file answers, commissions to take evidence, fixing days for hearings and so forth. All these entries, including the recording of final decrees, are in Latin with the exception of minutes of decrees. These appear in English. The manner in which the minutes are written, the handwriting invariably becoming ragged towards the end, indicates that they were taken down in open court and were probably dictated. It is just possible that the register was not originally required to take down minutes of decrees but merely to record whether or not a decree had been granted. However great his command of Latin might be, it would still require a considerable effort to translate the minutes as he took them down. So if he found English more convenient, why did he bother to record everything else in Latin? It may be that he did so because such entries had always been made in Latin. On the other hand if recording minutes was a fresh duty imposed at a later date the registers may have felt themselves free to follow the easier course because they were not bound by any precedent in that respect. However, by the reign of Philip and Mary, Latin was falling into disuse and even formal entries were in English.

<sup>4</sup> Cal. Pat. Rolls, Edw. VI, ii, p. 3.

## THE DECREE ROLLS

The Decree Rolls preserved at the Public Record Office commence in 1534 and according to Sir Julius Caesar, who was Master of the Rolls in the early seventeenth century, enrolment began at this time. Nevertheless written decrees must surely date from an earlier period, though none appears to have survived. From about the middle of the fifteenth century we find records of decrees in equity proceedings commenced by bill indorsed on the original bills of complaint filed in the Chancery and the written decree probably dates from this time. Once enrolment began the original document signed by the Chancellor<sup>5</sup> remained with the court and the successful party could obtain an exemplification under the Great Seal.

At the date when the Decree Rolls begin the decrees were drafted entirely by the Six Clerks. Towards the end of the fourteenth century the Master of the Rolls was assigned six clerks to assist in keeping the Rolls and to write out writs under his supervision. Consequently they must have been regarded as the most suitable persons to consult regarding petitions to the Chancellor and before very long they were acting as solicitors to the parties. This function was eventually recognised officially and became an integral part of Chancery procedure, continuing, in theory at any rate, until the nineteenth century. However, there is no reason to suppose that until the latter part of the sixteenth century they did not perform their duties as solicitors quite efficiently.

The main authority for my statement that the Six Clerks drafted the decrees comes from a Petition of the seventeenth-century register, Sir Lawrence Washington, to Archbishop Laud.<sup>6</sup> He says that Henry VIII founded the office of register, but I suspect that was only because he could not find any Decree Books of an earlier date. At any rate he goes on to say, "Before that time the business was discharged by the Six Clerks who being attorneys retained in causes in the court were not indifferent parties to set down orders." There is also other evidence which supports this contention. In 1547 there appears this entry in the register's book : "a decree is granted on behalf of Folke Conway against Peter Conway; which decree Mr. Judd attorney for the said Folke is commanded to draw."<sup>7</sup> Further evidence is afforded by the case

<sup>5</sup> These documents which came to be described, rather inappropriately as "docquets" are preserved in the Public Record Office, but have never been arranged. The earliest I have seen is dated 1630; whether in fact they are preserved since 1534 is doubtful.

<sup>6</sup> Cal. State Papers, 1637, p. 561.

<sup>7</sup> 1 & 2 Edw. VI, Reg. Lib. B, Fo. 60.



of *Edward v. Trevor*<sup>8</sup> decided in 1552. Since the decree also gives an unusual as well as useful picture of the workings of the court, it is worth quoting at some length.

After reciting that the plaintiff had been granted a decree the Roll continues:—"Whereupon the said decree was drawn and signed with the Lord Chancellor his hand and by Master Powle being the plaintiff his attorney delivered to Master Standyshe then being register to be entered, and thereupon the said plaintiff most craftily and falsely made one other absolute decree and counterfeited the said Lord Chancellor his hand to the same and brought the said counterfeit decree to Master Powle his clerk declaring that Master Standyshe had sent it to be enrolled and desired to have it exemplified which was exemplified; and after upon the examination and proof of the counterfeiting of the said absolute decree the enrolment of both decrees was stayed." After fruitless attempts to track down the plaintiff the matter was again brought up in court, and the decree goes on "the matter being debated heard and fully understood and for that it appeared manifestly as well by the confession of Master Powle now to the Court as heretofore to the Lord Rich then Lord Chancellor as to all other the Six Clerks to whom the matter was disclosed at the first examination of the said Master Powle for his discharge and honesty in that behalf, that the decree was forged it is therefore ordered adjudged and decreed, etc., . . . that as well the said first decree as also the said counterfeit decree from henceforth shall be cancelled and utterly made void and of non effect." The fact that suspicion immediately fell upon Powle suggests that he was the person who in the normal course of events would have been expected to have drawn the decree. An interesting feature of this case is that the court appears, of its own motion, to have recalled the original decree after enrolment. The decree states that the defendant did not appear at the first hearing, and there is no mention of his being represented at the final hearing.

I have found cases after the Rolls begin where the decree has not been enrolled but merely indorsed on the back of the bill. Such cases are very rare and the general practice appears to have been that every decree was enrolled as a matter of course. The procedural steps I am now dealing with were solely concerned with the preparation for signature by the Chancellor of the document which formally set the court's decision. The early records indorsed on the bills are in Latin and until 1544-45 the enrolled decrees are likewise in Latin and follow the same form. The use of English

<sup>8</sup> Decree Rolls, P.R.O.C. 78, No. 34 on roll.

marks a change in the form of the decree, at once becoming longer and more elaborate. Thenceforth all decrees follow the same pattern. The case of *Procter v. Lodge*<sup>9</sup> decided in 1548 provides a fair illustration of the procedure for perfecting the final decree.

#### PROCTER v. LODGE

The hearing took place on June 8 and the register's book contains the following entry:—"A final decree to be made that Procter shall pay unto the said Lodge at or before the feast of St. Michael next the sum of fifty and five pounds and also save Lodge and sureties harmless against the executors of Richard Pymond late deceased of and for six soders of lead attached at York by the executors of the said Pymond in the hands of Gylman Way master of York for the which Peter Jackson and William Savage of York being bounden at the request and for the said Lodge, and Lodge to deliver at the time of the payment of the money to Procter his obligation with a general acquittance of all things between them unto this day."

Now it is apparent from the words "a final decree to be made," that the hearing was not regarded as the culminating point in the action. The true effect of the order at this stage can be expressed in the words of *The Practical Register in Chancery*:<sup>10</sup> "Till the decretal order be drawn up and signed and enrolled it has the force only of an interlocutory order and is not final . . ." Moreover at the date when this passage was written enrolment had for all practical purposes already fallen into desuetude. When the order had been taken down it was the duty of the register to read over the minutes; a useful precaution against mistakes. This observance seems to have been followed, though probably intermittently, until the latter part of the eighteenth century.<sup>11</sup> The decree was then drawn up by the Six Clerk acting for the successful party and presented to the Chancellor for signature and the fact entered in the register's book. In the case of *Procter v. Lodge*<sup>9</sup> this occurred eleven days after the hearing when the following entry appears in the book: "Finale decretum inter partes praedictas per record sub manu Dom. Cancel. signat. plene apparat."<sup>12</sup> There is very little variation in the form of such entries, though usually the words "atque ita traditur irrotulandum" are added and often the name of the Six Clerk to whom the decree was handed is mentioned. During the next reign the use of Latin dies out almost

<sup>9</sup> 1 Edw. VI, Reg. Lib. A, Fo. 144.

<sup>10</sup> 1714 edition, p. 123.

<sup>11</sup> *Sanders Orders*, p. 265; and also Parl. Papers, 1826, XV, App. A, p. 47.

<sup>12</sup> 1 Edw. VI, Reg. Lib. A, Fo. 173.

entirely but there is still no substantial alteration in the form of the entries.

No doubt the Chancellor originally signed the decree in open court. However it seems probable that the signing did not necessarily take place in court at the date of *Procter v. Lodge*.<sup>9</sup> Furthermore, Lord Wrythesley's Orders laid down "that the Six Clerks during the time of the Court do stand at the bar of the Chancery three on the one side and three on the other . . ." <sup>13</sup> Consequently it is hard to see how the plaintiff in *Edward v. Trevor*<sup>8</sup> could have hoped to escape detection if the decree he had forged should have been signed in the presence of his attorney in court.

The order part of the enrolled decree in *Procter v. Lodge*<sup>9</sup> differs quite substantially from the wording of the minutes. I do not propose to set out the decree in full but only the parts of it which show the form in which it is cast, since this form remained more or less unaltered until the nineteenth century. The decree <sup>14</sup> begins: "Memorandum that upon matter in variance depending before the King our Sovereign Lord in his Court of Chancery between Thomas Procter gentleman Plaintiff and Thomas Lodge of London broker Defendant for that the said Procter should have delivered or cause to be delivered to the said Thomas Lodge or his assigns sixty soders of lead . . ." The decree goes on to recite that Procter had entered into a "writing obligatorie" whereby he undertook to be bound in the sum of £240 to Lodge in the event of non-delivery of the lead or any part thereof. Procter failed to deliver the full amount and Lodge obtained judgment in the Common Pleas for the amount of the penalty. Thereupon Procter applied to the Chancery for an injunction, and Lodge was called upon to justify his common law action. The decree then recites that the petition answer and reply were read and witnesses examined from which it appeared that part only of the lead had been delivered, and that part had been attached for debt by one Pymond. It then continues: "It is therefore this present term of Trinity that is to say the eighth day of June in the second year of the reign of our sovereign Lord Edward the Sixth, etc., etc. . . . ordered adjudged and decreed that the said Procter his executors or assigns shall pay or cause to be paid unto the said Thomas Lodge, his executors or assigns at or before the feast of St. Michael the Archangel next coming £55 of good and lawful money of England, and it is further ordered and decreed by the said Lord Chancellor and Court of Chancery that the said Thomas Procter his executors and administrators should

<sup>13</sup> *Sanders Orders*, I, p. 9.

<sup>14</sup> Decree Roll P.R.O. Edw. VI, 5th Part, No. 11 on roll.



save the said Thomas Lodge and his sureties harmless against the executors of the said Pymond and the said Gylman of York of and for the said six soders of lead attached at York by the executors of the said Pymond in the hands of the said Gylman for which Peter Jackson and William Savage of York being bounden at the request and for the said Lodge, Provided always that the said Thomas Procter be made party to the pleading of the said attachment in convenient time before any judgment be given. And the said Thomas Lodge at the time of the payment of the said £55 to deliver to the said Procter his obligation with a general acquittance for all things between them until this present day."

It will be noticed that although the decree was not signed until June 19 it was dated as at June 8 when the hearing took place. I have found instances at this period where the decree bears the date upon which it is signed but these are exceptional, and in such cases the final entry in the register's book records the date inserted in the decree. The decree in *Procter v. Lodge*<sup>14</sup> also provides an illustration of provision being made in the decree for a point not dealt with at the hearing since Procter is to be made a party to the attachment.

#### CHANGE IN REGISTER'S FUNCTION

I have indicated above that hitherto it was customary for the register to enter orders pronounced in open court in his book then and there, and that he had no responsibility for the form of the orders he recorded. In order to explain the change which presently takes place I should add that an examination of the early Decree and Order Books shows that there are instances where orders, apart from those of a merely formal nature, must have been written up out of court. This is apparent from the handwriting. Furthermore, the Patent granted to John Adams in 1551 refers to the "office of Register of notes orders and decrees in the Court of Chancery."<sup>15</sup> Evidently it was becoming more convenient to enter up some matters after the court rose, probably the more elaborate directions, from notes taken down at the hearing. Certainly the entries were becoming lengthier during Edward's reign, and writing out complicated orders in court would tend to waste valuable time. With the volume of work increasing rapidly the problem of reducing delays was obviously becoming very serious. The earliest surviving Term Book dates only from 1639 but the use of some form of book for taking notes in court probably started at about this period.

There can be little doubt that the change in the function of the register began as a means of saving time in court. Entries of

<sup>15</sup> Cal. Pat. Rolls, Edw. VI, iv, p. 154.

minutes followed by a separate entry of the signature of the decree continue up to the beginning of Elizabeth's reign. However, during the fourth and fifth years of Mary's reign there are instances where only one entry occurs. Here the minutes of the order are not recorded separately, but are combined with the final entry relating to the signing of the decree. The case of *Temple v. Eggleton*<sup>16</sup> provides an example of this change. The Decree Roll shows that the hearing took place on January 24, 1558, although there is no record of the case in the register's book on this day. The entry appears on January 27, as follows: "A decree is made for the said Plaintiff to enjoy the land in question upon the disclaimer of the said Defendant as by the record thereof signed with the Lord Chancellor his hand appeareth and the said record is delivered to John Millicent attorney for the said Plaintiff to be enrolled." The decree is quite short but expresses the order in more formal language beginning, "... that the said Francis Temple shall from henceforth have hold occupy and enjoy the said messuage and land meadow and pasture with the appurtenances . . . etc."

As I have just mentioned, the practice of making two separate entries does occur up to 1558 but thereafter it ceases entirely. Indeed the speed with which this change of procedure was effected is rather startling. Although I have no evidence to support this contention I suspect that the policy of allowing the register to draft orders began with interlocutory orders. As early as the reign of Edward VI there appears a tendency for such entries to take on a more formal aspect. Likewise, with the final decree a note of formality now becomes apparent in the entries. In 1559 a typical example<sup>17</sup> runs: "A decree is this day made for the said Plaintiff upon the hearing and debating of the matter between the parties in the words following: . . ." The formal wording of the order is then set out and the entry ends "and this decree being signed with the hand of the Lord Keeper it is delivered to Humphrey Waldron attorney for the Plaintiff to be enrolled."

It is hard to escape the conclusion that Sir Nicholas Bacon played a decisive part in completing the process. He was appointed Lord Keeper on December 22, 1558, and we know that he did a great deal to promote the efficiency of the Court of Chancery. Hitherto orders made concerning the Chancery dealt almost entirely with organisation; but Sir Nicholas Bacon made at least sixteen separate orders with regard to procedural matters during his term of office. That he made no order concerning the register can be

<sup>16</sup> 4 & 5 P. & M. Reg. Lib. A, Fo. 93: Decree Roll P.R.O. C. 78/12 No. 39.

<sup>17</sup> *Cock v. Penrodocke*, 2 & 3 Eliz. Reg. Lib. A, Fo. 50.

explained by the fact that he was doing no more than accelerate a process which was already under way. Matters might have been different if there had been any opposition on the part of the register or the Six Clerks; but then the new arrangement was to their mutual advantage. The register was now in a position to draw the orders as verbosely as he dared and thereby increase his fees. Equally the Six Clerks benefited by allowing the register to draft the only part of the decree which required any great skill. They did not forgo any fees and could delegate the task of drawing up the decrees to their under-clerks. These under-clerks (who came to be known as the Sixty Clerks since each Six Clerk was limited to ten) eventually became entitled to the fees for drawing decrees though of course they had to pay over a proportion to the Six Clerks.

During the early stages of the new procedure the interval between the hearing of the action and the signing of the decree was fairly short, being seldom longer than a fortnight and often only a matter of days. Needless to say, this state of affairs did not last for long and, although decrees continued to be enrolled as a matter of course, the drawing up of the documents for signature must have fallen into arrear. Accordingly the register began to enter the minutes of the decrees before the record was signed. Within the space of a few years the entry of the decree no longer ends with the memorandum of signature. When eventually the decree was drawn up and signed for the purpose of enrolment, the fact was noted in the register's book underneath the entry of the minutes. The words usually found are, "Signatur manu Dm. Cancellar. et delibatur Shuckborough" (or other of the Six Clerks) "irrotuland."

There is only one further development in the register's functions during this period. Sometime after 1570 it became usual to enter the facts which were proved at the hearing in addition to the minutes of the order. Undoubtedly this addition was due to the development of the Bill of Review, for it became a rule that any facts which were proved at the original hearing and did not appear in the decree, were taken as not proved on review.<sup>18</sup> For a long time now, decrees had usually recited the matters which had been proved, though not in any great detail. It would seem therefore, that the court was already taking steps to limit the matters which could be raised on appeal; consequently the wording of such recitals was of considerable importance.

In the second half of Elizabeth's reign enrolment shows signs of falling into disuse. The decrees enrolled each year at the

<sup>18</sup> *Harrison's Practice in Chancery* (1767) p. 104.



beginning of the reign numbered about sixty or so, whereas in the last years of the reign the number was less than thirty. On the other hand the register's books had doubled in size by the middle of the reign, and by 1600 they were three times as large. It is not surprising that litigants became reluctant to enrol their decrees now that adequate records were kept by the register. Likewise it is not surprising that the register, finding that suitors were content with office copies of his entries, tended to make the entries more formal in appearance, and therefore much longer. A fair example of the form of entry at the beginning of the seventeenth century begins, "The matter in question concerning the manor and land in the bill mentioned being fully heard and long debated in open court before the Honorable the Lord Chancellor on . . . (date). It then appeared . . . (here follow the matters proved). And now upon long debating thereof in the presence of the Plaintiff and of the Defendant and upon hearing counsel learned on both parts. It is therefore ordered and decreed . . ." <sup>19</sup>

Although the order entered by the register had now become a document complete in itself—that is to say, a document which besides setting out the court's decision, also showed the nature of the action and the reasons for the decision—it did not purport to represent a draft of the final decree signed by the Chancellor and enrolled. However it soon became apparent that enrolment was an unnecessary expense. Indeed in the course of time enrolment came to be used merely as a tactical manoeuvre to discourage the opposing party from bringing an appeal, for to do so would entail the costly procedure by way of Bill of Review. The registers, not unnaturally, took advantage of this reluctance to enrol decrees by making their orders follow more and more closely the traditional pattern of the final decree, and so further increase their earnings.

The consequent accumulation of verbiage was finally brought to an end in 1833 <sup>20</sup> with the result that an enrolled decree thenceforth became, in effect, a copy of the order entered by the registrar. <sup>21</sup> With the abolition of enrolment in 1876 so far as Chancery orders were concerned, the entry of the order became the final stage in the procedure for setting down the court's decision in formal language. Thus the process of passing and entering the order, seen in its true perspective, so far from being an appendage grafted on to the final stage of the action, forms an integral part of the proceedings.

<sup>19</sup> 16 & 17 Jac. I, Reg. Lib. A, Fo. 1358.

<sup>20</sup> 3 & 4 Will. 4, c. 94, s. 10. By the same Act the deputy registers were reconstituted as registrars; the offices of register had lapsed at the beginning of the century.

<sup>21</sup> Consol. Orders 23, rule 10.

## BOOK REVIEWS

*Winfield on Tort.* Sixth Edition. By T. ELLIS LEWIS, Lecturer in Law, Fellow of Trinity Hall, Cambridge. [London: Sweet & Maxwell, Ltd. 1954. xl, 813 and (index) 23 pp. 50s. net.]

WINFIELD on *Tort* is one of the great textbooks of the law. I confess that I wondered what would happen to it after the death of Sir Percy Winfield: but Sir Percy left the book in good hands. He entrusted it to Dr. Ellis Lewis, who has prepared this new edition in a manner worthy of the master.

The editor of Winfield has a responsible task. It is a work used by students and practitioners alike. It will be found on the bench beside every judge trying civil cases. It must be simple enough for the student to understand and at the same time comprehensive enough for the practitioner to find what he wants. The editions prepared by Sir Percy himself filled these desiderata and Dr. Ellis Lewis has succeeded admirably in maintaining them. The law has developed a great deal since the last edition, but Dr. Ellis Lewis has brought the work completely up to date. Students will find here the fundamental principles discussed. Practitioners will find the latest cases fully noted: and, what is most useful, a reference to leading decisions in the Commonwealth. Take the vexed question of burden of proof in negligence cases. The courts have had several cases lately where an accident has been due to the negligence of one or other of two persons: but there is not sufficient evidence to pin it on to one rather than the other. Counsel always take as an illustration two sportsmen, one of whom shot the plaintiff in the eye, but no one can say which of them it was. It has usually been assumed in this country that the plaintiff would fail because he could not prove his case against either of them. Dr. Ellis Lewis, however, draws attention to *Cook v. Lewis* [1952] 1 D.L.R. 1, where the Supreme Court of Canada had that very case and said that the burden was on each sportsman to excuse himself. It is only by references of this kind that the courts of this country can keep in touch with developments in other parts of the Commonwealth. It is of great importance that the common law should develop as one homogeneous system throughout the Commonwealth. The Privy Council used to be the bond, but now that appeals to it have been so largely abolished, the textbooks must provide the links to keep the system together.

Another welcome feature is the modest and restrained manner in which new cases are discussed. Dr. Ellis Lewis does not adopt the superior air of the case critics. He does not say "This decision cannot be accepted" or the like. He adopts the true role of the

text-writer, which is to accept the decisions of the courts as binding and seek to fit them into the pattern of the law; and in particular, after our English fashion, to see what principle emerges from them. A good instance is his treatment of the liability of a master for his servant. The true basis of the master's liability has been under much discussion lately. One view is that it is a vicarious liability whereby an innocent master is made liable for the wrongs of a guilty servant. The other view is that it is a personal liability whereby a master is made responsible for seeing that his business is properly and carefully done. Although Dr. Ellis Lewis prefers to regard it as vicarious liability, he very fairly puts the modern view (which started with Uthwatt J. in *Twine v. Bean's Express* [1946] 1 All E.R. 202) that it is a personal liability of the master arising out of the duty which the law imposes on him.

It is to be noticed that Dr. Ellis Lewis does not press for the doctrine of liability for "casual delegation" which Sir Percy Winfield sought to promote in earlier editions. The reason is because it has been rendered unnecessary owing to the extended doctrine of agency. This holds that the owner of a vehicle is liable for the negligence of the driver whenever it is being driven wholly or partly on the owner's business. This topic reveals a good instance of the care with which Dr. Ellis Lewis has prepared this edition: for he gives a reference to the instructive case in the Mayor's Court where school governors were held liable for the negligence of a schoolboy cox. It is reported only in [1953] 2 Lloyd's Rep. 613.

Not only are the cases fully noted, but the book contains a wealth of references to articles in current periodicals all the world over. For instance, if there is anyone who would nowadays seek to revive the doctrine of last opportunity, he will find references in this book to articles by Lord Wright saying that it has been completely abolished for all practical purposes: and, more cogent than anything else, the decision of the House of Lords in *Stapley v. Gypsum Mines* [1953] A.C. 667 is quite inconsistent with the survival of any such doctrine, because Stapley had the last opportunity of avoiding the accident and yet his widow succeeded.

The book is longer than it was by 100 pages. I am not surprised at this, because Dr. Ellis Lewis has devoted a good space to the daily problems with which practitioners have to deal. This is all to the good. There is for instance a useful statement of the factors considered by the courts in judging of negligence, such as the degree of risk, the expense of safety measures, the general practice of the trade, and so forth.

I cannot in the space of this review go further into the merits of this new edition of Winfield. I am greatly impressed with the great care with which the work has been done and by its completeness. It should prove itself more useful than ever.

A. T. DENNING.



*Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat.* By C. J. HAMSON, Fellow of Trinity College, Professor of Comparative Law in the University of Cambridge, of Gray's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1954. x and 222 pp. 12s. 6d. net.] Published under the auspices of the Hamlyn Trust.

THE Hamlyn trustees acted judiciously in inviting Professor Hamson to deliver the sixth series of lectures on comparative jurisprudence "to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples . . ." The result is a concise, carefully wrought, and vivid account of the judicial work of the French Conseil d'Etat, with special reference to the procedure whereby administrative acts or decisions are challenged, the *recours en annulation pour excès de pouvoir*. The author's distinction, his skill in presentation, his gift for perceiving the spirit of institutions, and the advantages that he has enjoyed in preparing the book, seem likely to make it the standard introduction to the subject for English readers; and it may be earnestly hoped that there will be a wide circulation among civil servants, members of Parliament, and the judiciary.

Professor Hamson's style is admirably adapted to a work of this kind. It is difficult to imagine a more satisfying reconciliation of the demands for emphasis on the main points, reasonable comprehensiveness, and stimulation and guidance to further inquiry. Those familiar with his lecturing methods will encounter with delight many characteristic touches—the audacious generalisation ("To allow the great and increasing power of the executive to be exercised against the individual arbitrarily—that is to say, according to its own will . . ."); the rhetorical flourish ("the marvellous mirror of comparative law"); the paradox ("Like the common law itself, or at least some branches of it, the law of the Conseil d'Etat is to some degree strictly speaking incommunicable"); and the creation of an atmosphere of interest and suspense in a manner faintly reminiscent of Conan Doyle ("The decision is that rendered by the Conseil d'Etat . . . in its most solemn judicial form . . . It concerns the consolidated appeals of five young men, one of whom was named *Fortuné*; and I first heard of it under that name. But it will probably become known in France as *l'affaire de l'Ecole Nationale*, though the *Ecole Nationale* was not a party to the proceedings. There can be no doubt about its leading character.")

By reason of Professor Hamson's familiarity with the French legal scene and his close contact with members of the Conseil d'Etat the work has an authority unusual in a short study by a foreign observer. Generous tributes are paid in particular to M. Maxime Letourneur, now senior Commissaire du Gouvernement.

Such an officer appears to be a sort of permanent and influential *amicus curiae*, providing the tribunal with independent, learned and constructive assistance of a nature unknown in the English courts. M. Letourneur indeed emerges as the hero of the book, for the decision in *l'affaire de l'Ecole Nationale*, the case used throughout to illustrate the effective control exercised by the Conseil d'Etat over Ministers, was inspired by his submissions.

The constant theme of the lectures is that even the Section du Contentieux of the Conseil d'Etat is essentially an expert administrative body rather than a detached court: its success in detecting and redressing departures from a reasonable standard of conduct by the executive in relation to the citizen derives from the unrivalled knowledge and competence of its members in matters of administrative technique. They are "the finest flower of the civil service as such," and maintenance of their corporate unity with the advisory Sections of the Conseil d'Etat, who share "the innermost secrets" of the executive, is the prerequisite of their strength. The need for securing the confidence of the executive in any tribunal to which it is answerable leads Professor Hamson to suggest that some development within the executive itself, instead of the vesting of new functions in a branch of the High Court, may help to solve English problems. The type of development that he has in mind is scarcely more than hinted at; but one vision conjured up is of a body like a Royal Commission in continual session, or a Crichton Down inquiry on a grand scale. The suggestion obviously deserves careful elaboration and scrutiny. The claim that no legislation would be required might not prove easy to establish, especially if, as is envisaged, there is to be power to give some form of practical redress.

It is evidence of the author's capacity to whet the appetite, rather than of any shortcoming in his book, that there are numerous questions which the reader would wish to put to him. Thus, we are told that a criticism of the Conseil d'Etat—and Professor Hamson does not seek to gloss over grounds for criticism—is that it "has managed, at a tremendous expense of intellectual ability, to keep in approximately tolerable operation an administrative machine which is obsolete and sometimes corrupt." May this point be carried further? To what extent does the fact, to put it crudely, that all the best administrators are judges, tend to sap initiative and responsibility in the humbler active official? Similarly, some pertinent comments on the effect of the jurisdiction of the Conseil d'Etat on the national interest could no doubt be made from the point of view of the Minister whose refusal to accept certain candidates for entry into the higher grades of the civil service was quashed in *l'affaire de l'Ecole Nationale* because he would neither deny that the reason for the decision was their political opinions, nor (perhaps fearing difficulty in Parliament) attempt to prove that they were specially connected with the Communist Party. But,

since the views of government departments do not lack advocates, Professor Hamson might fairly say that natural justice did not require him to put the case for the other side.

The main difference discerned by the author between French administrative law and the present state of English law is that the ground of annulment of an executive act known as *violation de la loi* "even in principle is outside the theoretically established doctrine of *ultra vires* in England, however largely construed." The Conseil d'Etat requires the administration to conform to general principles of law, not laid down by positive enactment, but representing the conception from time to time formed by the Section du Contentieux of the spirit of the French legal system and the standard of conduct appropriate to the administration. Here again we are eager to know more. This sounds very like the ideal constitution that our judges are supposed to have in their minds: the French principles appear to be at once more fully developed, more flexible, and more difficult to displace than the presumptions which our courts are entitled to apply, and sometimes do apply, in construing statutes; but is there in truth a fundamental difference? Indeed a general reflection prompted by Professor Hamson's exposition is that the distinction between the substantive rules of the two systems of law, although at present marked enough in practice, is one of degree, not of kind. Neither the Conseil d'Etat nor the High Court professes to substitute its own opinion as to expediency for that of the administrator; and in discharging their duty of examining the legality as opposed to the desirability of the purported exercise of powers both tribunals proceed upon the theory that a discretion must not be exercised arbitrarily, capriciously, under the influence of extraneous considerations, or contrary to the purposes and spirit deducible from the authorising legislation. Certainly some English decisions in recent years have appeared to adopt a rather negative approach to such legislation, but there is ample precedent for less illusory legal control of the executive if the courts sense that the public interest requires it. The constructive approach is well illustrated by *Liversidge v. Anderson* on the one hand and *Prescott v. Birmingham Corporation* (decided after the delivery of these lectures) on the other. As for procedure, however, Professor Hamson exhibits to us another world. Perhaps the most striking feature of the procedure of the Section du Contentieux is not its written nor even its inquisitorial character but the aggregate of attention that is apparently devoted to a case. The ultimate decision is reached, at least in important cases, by a gradual process to which many minds contribute. Here is a marked contrast with our system, where so much turns on the way in which counsel decide to present a case to the court, and where the opportunities for reflection and reading given even to appellate judges are so severely limited.

As the scope of the lectures does not allow more than incidental



references to specific rules of English law, a reviewer's remarks on those references should be correspondingly brief. Professor Hamson naturally fastens on extreme examples to support his view that the High Court has "abdicated or made a grand refusal." The wisdom of joining the ranks of those who carp at the actual decision in *Liversidge's* case seems doubtful in the light not only of the approach there exemplified but also of the impressive degree of judicial concurrence in the decision and of the manner in which it has been distinguished by the Judicial Committee. Moreover a substantially identical decision was reached during the first world war by the High Court of Australia in *Lloyd v. Wallach*, 20 C.L.R. 299. And a French lawyer would surely be unreasonable if he were "shocked, and indeed profoundly scandalised" by the Judicial Committee's explanation in 1952 that a Rule requiring the reasons for a judgment appealed from to be included in the record does not apply when no reasons have been given. Finally, certiorari and its complexities are perhaps allowed too much of the stage. English administrative law is rich in remedies, and some attention might at least have been devoted to the versatile remedy of declaration.

But these last are very minor criticisms. The book is replete with attractively conveyed information and penetrating judgments. It can be read, and read again, with great profit and pleasure. May it be but the first of many notable contributions to comparative law by the author during his tenure of his chair.

R. B. COOKE.

*The Principles of Modern Company Law.* By L. C. B. GOWER, LL.M.(Lond.), Solicitor of the Supreme Court, Sir Ernest Cassel Professor of Commercial Law in the University of London. [London: Stevens and Sons, Ltd. 1954. xl and 574 and index 25 pp. 45s.]

PROFESSOR Gower's book is undoubtedly a most important event in the field of company law. Taking a subject frequently regarded as "technical and dull" he has produced an astute mixture of the academic and the practical without rival among the previous works, a volume "concerned with the living law of living companies in sickness and in health" (p.v.). For better or worse—probably better—he is content with one short chapter on winding up; but, for the rest, all the usual company law topics find a place, together with a varied assortment of other matters including partnerships, trade unions, unit trusts, public corporations, eight meanings of "capital," and a line from the poet Roy Campbell. Furthermore, problems of taxation receive not merely a mention in most parts of the book, but also a chapter to themselves; this is not

easy reading and might be relegated to a position later than Chapter 9. Chapters 2 and 3 contain an admirable account of the historical development of companies as we know them, the absence of which so often makes the modern rules appear in textbooks as an arbitrary kind of magic. More consideration might, perhaps, be given to the assignment of shares in the old deed of settlement companies, and to the possible illegality at common law of unauthorised assumption of corporate form, which is material to any discussion of the theoretical basis, if any, of our law. The modern registered company and the Companies Act, 1948, are of course, the focal points of the book, but comparison is throughout made with other corporations, and with foreign, especially American, practice. The latter leads to many interesting proposals, such as the suggestion (pp. 276 and 283) that a company might enforce a contract made for it by the promoter expressly as trustee—as for an unborn person—which has always seemed attractive to us, in spite of the sweeping dicta to the contrary (*e.g.*, in *Natal Land etc. v. Pauline, etc.* [1904] A.C. 120, a case which could be included in this section on promoters).

Some students may find certain difficulties in using this book, for few sections of the Act and few cases are set out in any detail, and an extensive knowledge of the law, civil and criminal, is, of necessity, assumed by the author. Sometimes his conciseness may even be misleading, as on p. 532, where it is suggested that the relevant payments must always be approved at the appropriate meeting under section 193 (3) of the Companies Act, 1948, whereas the section seems to be stating an alternative to subsection (1); and as on p. 278, n. 36, where express reference to *Armstrong v. Jackson* [1917] 2 K.B. 822 seems desirable, in the treatment of *Leaf's Case* [1950] 2 K.B. 86. Again, the extended analogy drawn between the company's constitution and a federal state, and directors and "the Government," which dominates most of the introductory chapter, may send the student back to his books on constitutional law rather than cause him to suffer the desired flash of enlightenment. Such minor difficulties do not prevent this from being by far the best book for any student of company law. The author has written, however, not merely for the student but for practitioner, and even layman, as well. Economic functions and practical difficulties are never out of the picture, and the book bristles with suggested improvements in law and practice. Professor Gower is particularly worried by the ineffectiveness of the present law on raising and maintaining capital (this concern about "watering" makes a little strange his advocacy of No Par Value shares) and by the practical problems in the way of shareholders' control of directors whose power over proxies is so often decisive. It may be that future experiments will lie in the sphere of external control rather than an extension of members' powers; already the Stock Exchange regulations are in many cases the real curb.

New ground is broken in the chapter on "Lifting the Veil" of the company's personality. Here the author has collected together a multitude of statutory provisions and judicial pronouncements (some of them, *e.g.*, on agency and residence, not involving any theoretical lifting of the veil) in a most valuable survey. He makes little reference to abstract theories about the nature of corporate personality which are "of no direct concern to the lawyer (as opposed to the political scientist) except in so far as they have influenced the judges in the development of the law" (p. 4, n. 8). It is true that such influence has been small, and the developments that he describes have, therefore, been "haphazard and irrational" (p. 224). Consequently, no surprise need be felt if the "tentative conclusions" to which he comes should sometimes be open to challenge. For instance, is it the case that the corporate veil will be ignored by the courts "if corporate personality is being blatantly used as a cloak for fraud" (p. 222)? None of the authorities seems to go so far towards such a doctrine of abuse of rights, certainly not *Re Darby* [1911] 1 K.B. 95. Again, the two main props for the view that the judges will sometimes "recognise the essential unity of group enterprise" cited on pp. 218-9 are cases where no discussion of any such point occurred, and the conclusion drawn would undoubtedly astound the judges who decided them. But, in a sense, that is Professor Gower's purpose in this section, for he is out to remind his readers that this is an area of law in which a consistent theory is to be desired. One hopes that the chapter will assist toward the attainment of that objective, especially when the acquiescence of shareholders is discussed. In similar vein, the chapter on "Companies distinguished from other Associations," which contains a succinct presentation of public corporations and unit trusts, the latter being put at last on the academic map, leads up to the question whether we have, or desire, any coherent body of corporation or association law. The author suggests that the nearest approach to this is Part IX of the 1948 Act dealing with the winding up of unregistered "companies"; on this point, it is submitted that his conclusions do not take sufficient account of associations said to be "illegal" for want of registration: see *Re Padstow, etc.* (1882) 20 Ch.D. 137; *Re Ilfracombe, etc.* [1901] 1 Ch. 110.

The habit of collecting hitherto scattered topics into a comprehensive whole is apparent, too, in the treatment of *Ultra Vires*. For once, problems of property, contract, and (briefly) tort and crime, are included. The discussion of *ultra vires* borrowing, however, is compressed into such a small compass that it needs most careful investigation. The account of cases like *Sinclair v. Brougham* [1914] A.C. 398, should be expanded; *Ministry of Health v. Simpson* [1951] A.C. 251 is made to support a debatably wide equitable right *in personam*, when the House of Lords was concerned to limit its decision to the situation before it; *Reversion*



*Fund v. Maison Cosway* [1913] 1 K.B. 364 finds no place; the *St. Peter Port Case* [1900] A.C. 317, is surely authority at most for possession passing under an *ultra vires* contract, not property; *Chapleo's Case* (1881) 6 Q.B.D. 696, may favour the view that borrowers can sue the directors in spite of constructive notice of the memorandum, rather than the opposite (*cf.* p. 92); and on notice, *Wilson v. Kelland* [1910] 2 Ch. 306, could be given a reference.

To his legal analysis, Professor Gower adds an especially strong tang of the City in the chapters on capital, securities, flotation and the prospectus. These will long be used for their account of the different methods of issue, and the statutory and stock exchange regulations with their "disclosure philosophy," and for the useful Table at p. 308 which gives a bird's-eye view of the position. Ingenious methods of attack are suggested to the shareholder. The idea that the prospectus can be used as a contractual document after allotment is attractive; but the notion that the common law right to repudiate for breach of condition is affected by "laches" (p. 326) is odd. Section 38 of the 1948 Act is, as usual, said to allow for an action for damages; but the treatment of section 38 (3) used to support that argument (pp. 331-2) seems inferior to the account of that subsection given on p. 310. The categorical statement on p. 375 that the representations in the share certificate relate only to the date of issue seems open to question; there is no explanation of the further steps required of the transferor in *Re Fry* [1946] Ch. 312; and the notion that a "claim for damages for fraud" is included in the right of set-off may need modification in view of *Stoddart v. Union Trust* [1912] 1 K.B. 181. This section on transfers and priorities, however, is the clearest formulation of a complicated topic.

In many places the author takes a bold line with cases that do not fall easily into a neat pattern. Nowhere is this more apparent than in the discussions of "fraud on the minority" and the "*Turquand* rule." On the former, his "rules," as he admits (p. 508), contradict the recent restatement by the Master of the Rolls [1951] Ch. 291, in that they import into the phrase "bona fide for the benefit of the company" two tests instead of one; this is hardly a satisfactory way of rescuing the earlier cases. On *Turquand*, he sets out to reconcile the cases in the manner of the note to the *Federated Bank Case* [1932] 2 K.B. 176, by distinguishing agents purporting to act within an authority usual to their position, from those acting unusually. The plaintiff can succeed against the company in respect of the first, unless he has been put on inquiry, or has notice actual or constructive of lack of authority, whether he has read the articles or not. This may be preferred to the solution of Slade J. in the recent *Rama Case* [1952] 2 Q.B. 147; but it does demand that the chairman of the board be given in law vastly greater "usual" authority than an ordinary

director (in order to reconcile the *Federated Bank* case with, e.g., *Houghton's Case* [1927] 1 K.B. 246). When we turn to the second type of case, Professor Gower suggests (p. 166) that no knowledge of the articles can here assist the plaintiff; he must always go further and inquire of the company. This seems to run counter to the view expressed in many of the cases that actual knowledge will be sufficient; and, indeed, Professor Gower's Rule 4 on p. 162 seems to agree that it is enough, in contradiction with his later view. In even bolder mood, he goes on to challenge the principle that the *Turquand* rule does not apply to a forgery, and concludes that this means only that it cannot validate the document. That is an attractive idea; but the submission that it represents the "present law" is optimistic.

The order in which the book is set out is refreshingly original, and forms a logical progression from the nature and constitution of the company, through consequences of incorporation, to flotation, securities, and the protection of the investor. But part of the price paid for this is the banishment of the Rule in *Foss v. Harbottle* (1843) 2 Hare 461, to Chapter 22. This gives rise to difficulties in relation to the principle that a member can sue to protect a private right. During a previous discussion on the effect of the articles, the author cites those cases which support the member's right to sue where there has been a breach of the articles (pp. 268 *et seq.*), and the Rule is said not to preclude that right (see too, p. 489). If, then, the member has the right to see that all the articles are observed, it is not easy to understand why even the possibility of ratification should mean that the Rule is not avoided "merely because there has been a breach of the articles" (p. 483). The distinction sometimes suggested (e.g., in *Boschoek v. Fuke* [1906] 1 Ch. 148), and hinted at on p. 483, between acts which are beyond the directors' powers and those beyond the company's powers under the *articles* does not appear to solve the problem. The member's private rights may have become so extensive that they have swallowed up the Rule. In truth, the courts have never properly correlated these two lines of cases; but they could, it is suggested, be more closely compared. And both of them are surely relevant to the discussion on the legal nature of shares. In that context, Professor Gower's arguments leave one not wholly satisfied, partly no doubt because of the ambiguity surrounding the term "chose in action," but partly, too, because he does not fully explain the way in which the shareholder has something more than contractual rights in that he has "rights in the company as well as against it" (p. 341).

Such suggestions as have been put forward above are made with hesitation, for this is a book which prompts in the reader the thought that, even if more might here and there have been said, the main job of giving to company law and its allied topics an

orderly and, as far as the sources permit, elegant appearance, has been thoroughly accomplished.

K. W. WEDDERBURN.

*The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence.* By JOHN AUSTIN. Introduction by PROFESSOR H. L. A. HART. Library of Ideas. Editors, ISAIAH BERLIN, STUART HAMPSHIRE, RICHARD WOOLHEIM. [London: Weidenfeld and Nicolson. 1954. xxxi and 393 and (index) 3 pp. 12s. 6d.]

"AUSTIN" has long been out of print, and law teachers will be grateful for this reproduction of the full text of the *Province of Jurisprudence Determined* together with the essay on "The Uses of the Study of Jurisprudence." It is to be hoped, however, that they will not be tempted to recommend it again for serious study by the law student. His time may be better occupied than in reading Austin's text, though it is still necessary for him to know something of Austin's main ideas. Criticisms of Austin, as Professor Hart observes, have proved to be a constant source of illumination. But an adequate basis for this can be laid in little more space than that occupied by the admirable summary in Professor Hart's introduction.

It is the views of Professor Hart which call for comment in this notice. "A legal system," he tells us at p. xii, "is a system of rules within rules; and to say that a legal system exists entails not that there is a general habit of obedience to determinate persons but that there is a general acceptance of a constitutional rule, simple or complex, defining the manner in which the ordinary rules of the system are to be identified." Thus, we are told, Austin "chose the wrong fundamental notions. The elements he uses do not include the notion of a rule or the rule dependent notion of what ought to be done" (p. xi). It is to be regretted that, confined within the limits of a stimulating introduction, Professor Hart, beyond noting that "the notions of a command and a habit however ingeniously combined cannot yield them" (p. xii), does not find room to explain his notion of a rule or the dependent notion of what ought to be done.

In the Preface to Austin's *Jurisprudence* (5th ed., 1885, at p. 20) Sarah Austin tells us that "long and accurate observation . . . had taught him . . . the importance of the habit of obedience to law." Austin may have been wrong in his analysis of this "habit of obedience." But if he was wrong in asserting that the existence of a legal system involves a habit of obedience to a determinate person, is Professor Hart right in asserting that it involves a *general* acceptance of "a constitutional rule, simple or complex, defining the manner in which the ordinary rules of the



system are to be identified"? The way to test a general acceptance in any real sense is to conduct a poll of general opinion. It would be interesting to try in this way to discover the rules for finding the binding principle of a case—or the limits of the powers of the South African Parliament.

To your reviewer it seems that Austin's sovereign and Professor Hart's vaguer and therefore more plausible adaptation of Kelsen's grundnorm are equally fictions—postulated to explain the same facts of "obedience." If Professor Hart were to substitute "acceptance by the courts" for "general acceptance" your reviewer would deem this an improvement. The test of "acceptance by the courts" is of course, "ask them"—and then check their words by their deeds.

But your reviewer would go further and ask whether Professor Hart himself chooses the right "fundamental notions." Is law best regarded as a system of rules or a system of action? Is a legal system a system of accepted rules or is it rather a system of acceptances, evidenced by obedient action and symbolised in statements called rules? In other words is a legal rule something first made and subsequently accepted—or is acceptance constitutive of its existence?

How, indeed, are we to conceive a rule? How would Professor Hart explain the relation between a notional simple sequence of actions or "pattern of conduct" and a rule? How would he explain "existence of," "statement of," "command of," "conformity with," "obedience to," "acceptance of," a rule? Given a notional conduct pattern, would commanding it, conforming with it, accepting it, *constitute* a rule? More specifically is the notion of "ought to be done," as Professor Hart says, dependent on the notion of rule—or does "acceptance as what ought to be done" convert a simple conduct pattern into a rule? On the latter view the notion of rule would be dependent on the notion of what ought to be done, rather than the other way about.

It seems possible that Professor Hart may not have said the last word about Austin's contribution to Jurisprudence. For Austin obedience was constitutive of a legal system, not merely an adjunct. This is not a mere matter of terminology; it is a matter of the terminology best adapted for revealing the structure and the arrangement of the elements of the fact it locates. Commands and obediences are actions, and in defining legal systems in these terms Austin construed law as in some sense a system of action. He defined a legal rule in terms of action—it was a command by a commander who was obeyed. This will not do. But the point is that for Austin obedience was in some sense constitutive of a legal rule, and law was in some sense a system of action. In your reviewer's opinion Austin's intuition in these respects was in some sense fundamentally right.

B. E. KING.

*Contract and the Freedom of the Debtor in the Common Law.* By I. S. PAWATE of the Bombay State Judicial Service. [Bombay: N. M. Tripathi, Ltd. 1953. x and 148 pp. 12s. 6d.]

THIS is an interesting book on the nature of contract and of consideration. The author seeks to show, in opposition to Holmes' theory of the partial slavery of the promisor to the promisee, that a promise is binding of its own inherent virtue, that it is the intention of the promisor to be bound that alone makes the promise binding, and that therefore it is an expression of the promisor's own freedom. The author finds in the common law authorities two theories of consideration, the Deceit Theory and the Merit Theory. The only reason why an offer is revocable is that if the Deceit Theory is applied there was as yet no deceit, and if the Merit Theory is applied the promisee was as yet unworthy of having the promise enforced. The promisor is always a free man, being bound by something originating from his own will: obligation becomes the "condensation of the entire freedom of the debtor . . . into the particular acts promised" (p. 45).

There seems something paradoxical in a theory, purporting to be based on freedom, that yet demands binding force at a stage earlier than is required by theories based on slavery. This insistence on freedom is made fundamental by the very title of the book, yet it seems the weakest link in a chain of reasoning otherwise well presented and well documented. Moreover, in his insistence that a promisor is bound only where he intends to be bound, the author does not seem to have sufficient regard to cases such as *Van Praagh v. Everidge*, where liability is imposed irrespective of the real intention of the offeror, or for that matter to any case where the offer is construed objectively. The view held by the author does explain, however, why mutual promises form consideration for one another (p. 68).

A clear summary of the scope of the work is given on pages 6 and 7, but the book ends on rather an abrupt note with a reference to a point that has already been made before (at p. 65). There are a good many examples of printers' metathesis, but the meaning is always clear.

R. N. GOODERSON.

*The Law Relating to Commercial Letters of Credit.* Second Edition. By A. G. DAVIS, LL.D. (Lond.), Solicitor of the Supreme Court; Professor of Law at Auckland University College, New Zealand. [London: Sir Isaac Pitman & Sons, Ltd. 1954. xxiii and 187 and (Appendix and Index) 20 pp. 30s.]

IN this work, which was originally his thesis for his doctorate, Professor Davis examines in detail that interesting and indispensable



phenomenon of the modern commercial world, the letter of credit, without which present-day international trade would be considerably impeded.

The basic problem is simple : how can a seller, shipping goods to a foreign buyer, ensure that he will be paid for those goods? He can, of course, insist on payment in advance, but this solution is not likely to appeal to the buyer, who would then have no certainty that the seller would in fact ship the goods. And so business men have devised the letter of credit, which a banker issues to the seller at the request of the buyer, and which is an undertaking by the banker to accept any bills of exchange that the seller draws on the banker up to the amount specified in the letter of credit, being the purchase price of the goods. The banker's credit is thus substituted for that of the buyer.

This is the essence of the commercial letter of credit, which is described and analysed by the author with a detail and clarity which render perfectly understandable transactions which are apt at first sight to appear complex. Thus, the first half-dozen pages of Chapter 2 are especially lucid in their exposition of the purpose and operation of a letter of credit.

But, as the author points out, in this sphere commercial practice is in advance of established law, even in the United States, where cases have been more numerous than in this country. And, even though extensive references are made to American decisions and authorities, many questions await judicial determination, especially as the creators of the device themselves indulge in a certain latitude in their use of such adjectives as "revolving," "divisible," or "transmissible," in order to meet varying commercial situations. This inconsistency is especially apparent in the use of the terms "confirmed" and "irrevocable," which have often been treated, by both business men and judges, as interchangeable. The text clearly establishes the proper distinction, recognised in the United States, and gaining recognition here, that a letter of credit can strictly constitute a confirmed credit only when the issuing banker advises the seller of its issue through a correspondent banker (usually in the same country as the seller) who adds his own undertaking to that of the issuing banker and so confirms the credit; whereas whether a credit is irrevocable or not is a matter for the issuing banker to declare.

The legal relationships between the parties involved in a letter of credit are fully discussed with the same engaging clarity and accuracy; the obligations undertaken by the buyer when he engages, in the contract of sale, to open a credit in the seller's favour—perhaps the particular aspect of this topic which has most frequently come before the English courts in recent years; the contractual relationship between the buyer and the banker, resulting in the issue of the letter of credit; and that elusive relationship between the banker and the seller, elusive, at any rate,



to the common lawyer, who is apt to see in the letter of credit merely a gratuitous offer which can be revoked by the banker at any time before it has been acted upon, despite any label of "irrevocable" which may be attached to it.

Professor Davis, in the Preface to this edition, tells us that he has cut down his discussion of this problem at the suggestion of some banker friends who consider the matter to be of little practical importance, but he still, very properly, examines briefly the various theories which have been propounded to explain the relationship, for it is very unsatisfactory, to say the least, to suffer such a divergence between law and practice without attempting to remove it. Whatever the precise juristic nature of this relationship may be, however, it does undoubtedly confer on a seller who has acted upon the undertaking certain rights against the banker, the most important of which is the right to have his bills accepted by the banker in accordance with the terms of the letter of credit. These rights, and the measure of damages recoverable by the seller on any violation thereof, are dealt with in other chapters, and also such questions as the position of a correspondent banker and of a banker to whom the seller has discounted the bills; the negotiability and assignability of a letter of credit; and the claims of the issuing banker against the goods which are the subject-matter of the contract of sale—the treatment of this last topic includes an excellent account of such documents as trust receipts and letters of hypothecation.

It should be apparent from this remark that this book offers little opportunity of criticism. Perhaps the treatment in Chapter 11 of the duties of the seller in tendering the proper documents to the banker, tends to become a little diffuse, and perhaps Chapter 10 might follow more naturally after Chapter 8, but such faults as these only become noticeable because of the very high standard of accuracy, clarity and simplicity of the book as a whole, and no one who reads it will fail to obtain a substantial grasp of the law and practice of commercial credits.

C. F. PARKER.

Books also received include the following:—

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